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FILED
JAN 12 1943
CHARLES ELMORE CROPLEY
CLERK

No. 649

In the Supreme Court of the United States

October Term, 1942.

MARGARET MASHUNKASHEY, NOW BRADSHAW,
Petitioner,
vs.
UNITED STATES OF AMERICA; A. G. WILLIAMS, GUARDIAN OF JAMES G. BLAINE, JR.; MAMIE MASHUNKASHEY, EXECUTRIX OF ESTATE OF BEN MASHUNKASHEY, DECEASED; AND L. M. COLVILLE AND JOHN W. KEITH, JOINT ADMINISTRATORS OF ESTATE OF PAH-PU-SON-TSA, DECEASED,
Respondents.

Petition for Writ of Certiorari, and Brief in Support Thereof.

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INDEX.

	PAGE
Petition for writ of certiorari	1
Opinion below	2
Jurisdiction	2
Judicial Code, Sec. 240 as amended by Act of February 13, 1925 (chap. 225, 43 Stat. 938, 28 U. S. C. A. 347)	2
Questions presented	2
Statutes involved	4
Summary statement	4
Specification of errors to be urged	9
Reasons relied upon for allowance of writ	10
Brief in support of petition for writ of certiorari	11
I. The jurisdiction of the Federal Court	12
1. The descent of lands and moneys of decedent was controlled by the laws of the State of Oklahoma	17
2. Applicable state statutes	17
3. Interest that vested in petitioner was unrestricted under and by virtue of Section 6 of Act of April 18, 1912	18
II. On the merits	21
III. The application and validity of Section 7 of the Act of Congress of February 27, 1925	23
The power of Congress	27
VI. The writ of certiorari should issue	29
Appendix—Statutes involved	30

TABLE OF CASES.

Barnett v. United States, 82 F. (2d) 765	14
Butler v. United States, 297 U. S. 1, 56 S. Ct. 312	28
Carter v. Carter Coal Co., 298 U. S. 238, 56 S. Ct. 855	28

PAGE

City of Indianapolis v. Chase National Bank, 314 U. S. 63-76, 62 S. Ct. 15-20 11
Cramer v. United States, 261 U. S. 219, 43 S. Ct. 342.. 14
Cope v. Cope, 137 U. S. 682, 11 S. Ct. 222.....25, 26, 27
Coyle v. Smith, Sec'y of State, 221 U. S. 559, 31 S. Ct. 688 28
Davis v. Morgan, 186 Okl. 30, 95 P. (2d) 856..... 17
Dick v. Foraker, 155 U. S. 404, 15 S. Ct. 124.....17, 21
Eddy v. Eddy, 168 Fed. 590..... 20
Frost v. Spitley, 121 U. S. 553, 7 S. Ct. 1129.....17, 21
Federal Trade Commission v. Bunte Bros., 312 U. S. 349, 61 S. Ct. 580 24
Gay v. Ruff, 292 U. S. 25, 54 S. Ct. 608, 92 A. L. R. 970. 26
Globe Indemnity Co. v. Bruce, 81 F. (2d) 143..... 26
Hamberger v. White, 54 Okl. 736, 154 Pac. 576..... 22
Hansen v. Hoffman, (C. C. A. 10) 113 F. (2d) 780.... 19
Heckman v. United States, 224 U. S. 413, 32 S. Ct. 424 .....13, 16, 19, 20
Herron v. Harbour, 75 Okl. 127, 182 Pac. 243..... 22
Jackson v. Harris, 43 F. (2d) 513.....17, 25
Jefferson v. Fink, 247 U. S. 288, 38 S. Ct. 516, 62 L. ed. 117 .....17, 25, 28
Kelleam v. Maryland Casualty Co., et al., 312 U. S. 377, 61 S. Ct. 595 11
LaMott v. United States, 254 U. S. 570, 41 S. Ct. 204 .....13, 20, 25
Marlsbough v. Smith, 11 Kan. 554..... 22
Mott v. United States, 283 U. S. 747, 51 S. Ct. 642.... 14
Riffe v. Walton, 105 Kan. 227, 182 Pac. 640, 6 A. L. R. 549, ann. 565 22
Schlemmer v. Buffalo, Rochester & Pittsburgh Ry. Co., 205 U. S. 1, 27 S. Ct. 407..... 28
Scott v. Moore, 52 Okl. 200, 152 Pac. 823..... 22
Smith v. Reneau, 188 Okl. 629, 112 P. (2d) 160..... 21
Soders v. Armstrong, 172 Okl. 50, 44 P. (2d) 868..... 22
South Carolina v. United States, 199 U. S. 439, 26 S. Ct. 110 28

TABLE OF CASES—CONTINUED.

PAGE

Strickland v. Peters, (C. C. A. 5) 120 F. (2d) 53.... 20
Sunderland v. United States, 266 U. S. 226-233, 45 S. Ct. 64 .....21, 25, 27
United States v. American Bell Tele. Co., 128 U. S. 319-325, 9 S. Ct. 90-97 13
United States v. Barnes, 222 U. S. 513, 32 S. Ct. 117.. 26
United States v. Bond, 108 F. (2d) 504 (10 C. C. A.).. 15
United States v. Borden Co., 308 U. S. 182, 60 S. Ct. 182 26
United States v. Burroughs, 289 U. S. 159, 53 S. Ct. 574 26
United States v. Creek Nation, 295 U. S. 103, 55 S. Ct. 681 20
United States v. Cook, 17 Wall. 168, 21 L. ed. 536.... 28
United States v. Fitzgerald, 201 Fed. 295..... 14
United States v. Fixico, 115 F. (2d) 389 (10 C. C. A.). 15
United States v. Fox, 94 U. S. 315-320-321, 24 L. ed. 192 .....21, 27
United States v. Goat, 224 U. S. 458, 32 S. Ct. 544.... 14
United States v. Gray, 201 Fed. 291..... 14
United States, ex rel. Warren, v. Ickes, 73 F. (2d) 844 (U. S. Dist. Ct. A. D. C.) 15, 19
United States v. King & Howe, 78 F. (2d) 693..... 28
United States v. Minnesota, 270 U. S. 181, 46 S. Ct. 298 .....15, 19
United States v. Mullendore, 30 Fed. Supp. 13-..... 19
United States v. Osage County, 251 U. S. 128, 40 S. Ct. 100 13
United States v. Sandoval, 231 U. S. 28-35, 34 S. Ct. 1-6 .....24, 28
United States v. San Jacinto Tin Co., 125 U. S. 273-280, 8 S. Ct. 850-857 13
United States v. State of West Virginia, 295 U. S. 463, 471, 55 S. Ct. 789, 792, 793.....16, 17, 21
Washington v. Miller, 235 U. S. 422, 35 S. Ct. 119..26, 27

Text Books.

PAGE

1 C. J. 527 21
Judicial Code, Title 28, U. S. C. A., Sec. 233, 36 Stat. 1156 12
Rule 38, par. 5 (b), of Supreme Court 2

Statutes.

Act of April 18, 1912 (37 Stat. 86) 18
Act of March 3, 1921 (41 Stat. 1249) 18
Act of February 27, 1925, Sec. 7 (43 Stat. 1008) 24
Act of February 27, 1925, Sec. 7 (43 Stat. 1008) 10
Act of June 14, 1934, c. 512, 48 Stat. 955 (28 U. S. C. A., Sec. 400) 16
Osage Allotment Act (34 Stat. 539) 24
O. S. 1941, Title 16, Sec. 4 ..... 22, 30
O. S. 1941, Title 16, Secs. 3 and 20 ..... 22, 31
O. S. 1941, Title 60, Sec. 331 21
O. S. 1931, Title 84, Sec. 213 18
36 Stat. 1091, 28 U. S. C., Sec. 41 (1), 28 U. S. C. A., Sec. 41 (1) 12, 30

IN THE SUPREME COURT OF THE UNITED STATES.

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vs.

UNITED STATES OF AMERICA; A. G. WILLIAMS, GUARDIAN OF JAMES G. BLAINE, JR.; MAMIE MASHUNKASHEY, EXECUTRIX OF ESTATE OF BEN MASHUNKASHEY, DECEASED; AND L. M. COLVILLE AND JOHN W. KEITH, JOINT ADMINISTRATORS OF ESTATE OF PAH-PU-SON-TSA, DECEASED,

Respondents.

PETITION FOR WRIT OF *CERTIORARI* TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

Petitioner, Margaret Mashunkashey, now Bradshaw, respectfully prays *certiorari* issue to review the judgment of the United States Circuit Court of Appeals for the Tenth Circuit, affirming the judgment of the United States District Court for the Northern District of Oklahoma, which she asserts was entered without jurisdiction of the court, as the subject-matter involved is a controversy between citizens of the same state, relating to the individual interest

in real and personal property that vested in petitioner by operation of law upon the death of her deceased husband, Charles Mashunkashey, on June 10, 1934, which interest, under applicable law, is unrestricted.

Opinion Below.

The District Court filed no opinion. The decree appears (R. 39-42). The opinion of the Circuit Court of Appeals which does not appear in any published report, appears (R. 104-109).

The judgment of the Circuit Court of Appeals was entered October 16, 1942, rehearing denied December 9, 1942, and on December 15, 1942, conformable to the rules, said court, by order, stayed its mandate pending filing of instant proceedings within thirty days.

Jurisdiction.

The jurisdiction of the Supreme Court of the United States is invoked under Section 240 of the Judicial Code as amended by the Act of February 13, 1925 (chap. 225, 43 Stat. 938, 28 U. S. C. A. 347), and under Paragraph 5 (b), Rule 38 of this Court.

Questions Presented.

I. Whether the United States District Court for the Northern District of Oklahoma had jurisdiction to render a declaratory judgment in an action brought by the United States on its own behalf and on behalf of certain restricted full-blood members of the Osage Tribe of Indians involving only the interest of petitioner, a non-member of the Osage Tribe of Indians, in certain real and personay property which passed to and vested in petitioner, by operation of law, upon the death of her husband, Charles Mashunkashey, June 10, 1934, free of all restrictions.

II. Whether a release or agreement purporting to have been executed on behalf of petitioner, a non-member of the Osage Tribe of Indians, purporting for a cash consideration to release, discharge and acquit the estate of her deceased husband, Charles Mashunkashey, from any and all claims which she may have against said estate by reason of being the widow of said Charles Mashunkashey, or for any other reason or cause whatsoever, can form the basis of an action brought by the United States, as plaintiff, in the United States District Court for the Northern District of Oklahoma so as to confer original jurisdiction on said court of said action, when all the parties to said agreement are citizens and residents of the State of Oklahoma; and when said release or agreement is insufficient in law in the absence of fraud or mistake to constitute a conveyance of real estate, or to constitute a sale or an assignment of personal property.

III. There is also involved the application of Section 7, Act of Congress, February 27, 1925, (43 Stat. 1008) and also the validity thereof, to-wit:

(a) Whether said section has any application to the descent of the individual property of a deceased member of the Osage Tribe of Indians.

(b) Whether, if said section be construed to regulate the descent of the individual property of a deceased member of the Osage Tribe of Indians, said section is valid.

(c) Whether the Congress had the power to regulate the descent of the individual property of members of the Osage Tribe of Indians after the admission of Oklahoma into the Union.

Statutes Involved.

The statutes involved are set out in the Appendix hereto, at pages 30-31.

Summary Statement.

The jurisdiction of the federal court was sought to be invoked by the United States on behalf of itself and of Ben Mashunkashey, Pah-pu-son-tsa and James G. Blaine, Jr., full-blood Osage Indians, residents of Osage County, Oklahoma, commencing this action in the United States District Court for the Northern District of Oklahoma against petitioner, a resident of Tulsa County, Oklahoma (R. 9). The relief sought was a declaratory judgment based upon a written instrument (R. 16-17) decreeing petitioner had no further right, title and interest in and to the real and personal property that belonged to her deceased husband, Charles Mashunkashey, in his lifetime.

The bill (R. 9-17) as to jurisdictional facts and controversy involved is vague and indefinite. While the bill seeks a declaratory judgment decreeing an instrument (R. 16-17) valid and binding, based on the theory of settlement and accord and satisfaction, and that petitioner had no further interest in the real and personal property not described (R. 15) *(a)* it describes no property except in general terms, referring to property owned and possessed by Charles Mashunkashey, a full-blood Osage Indian, in his lifetime as restricted property; *(b)* it neither alleges nor asserts who the heirs of decedent are or who succeeded to his real and personal property; *(c)* it deraigns no title in itself or in its wards, nor does it assert facts from which title might be inferred; *(d)* it does not allege the Indian wards are heirs of decedent; *(e)* it does not allege or assert that the petitioner,

the surviving wife, did not succeed by operation of law to an interest in the property of decedent on his death, although by praying that she be decreed to have no further interest, it infers that she did succeed to some interest; *(f)* it neither asks the protection nor asserts the invasion of any right of the United States in the real and personal property vested in petitioner by operation of law; *(g)* it neither alleges nor asserts the instrument (R. 16-17) is sufficient to constitute a conveyance or assignment of the interest in said property that vested in petitioner by operation of law, nor that it was so intended; *(h)* it alleges no fraud committed against the United States or against the Indian wards for whose benefit the action was brought—it alleges no mistake; *(i)* it fails to assert that the property which vested in petitioner by operation of law was restricted, or any right or supervision of the government over that property which vested in petitioner by operation of law.

Petitioner filed a motion for a more definite and certain statement and bill of particulars (R. 18-20), overruled (R. 20-22); motion to dismiss and demurrer (R. 23-24), overruled (R. 29); answer, (R. 29-38); amended answer attacking jurisdiction of the court and right of United States to maintain the action (R. 38-39).

It was stipulated (R. 49) that Charles Mashunkashey died June 10, 1934, leaving surviving petitioner, as surviving wife, no issue, no father or mother, a half-brother, Ben Mashunkashey, a maternal grandmother, Pah-pu-son-tsa, and that James G. Blaine, Jr., was of no blood relation.

Decedent, Charles Mashunkashey a full-blood Osage Indian, executed certain wills during his lifetime (R. 49) one being a will devising all his property to petitioner except $10 devised to Ben Mashunkashey, (copied R. 101-102). The

will was not approved by the Secretary of the Interior during the lifetime of decedent and was therefore ineffective.

May 16, 1936, petitioner (R. 91) employed Inghram D. Hook, an attorney, to represent her before the Secretary of Interior to have will approved. Pending rehearing before Secretary of Interior, negotiations were entered into between Mr. Hook and attorneys for Indian wards, being a conference at Pawhuska, but no settlement was agreed upon (R. 79). Correspondence was carried on through Department of Interior (R. 53-61). Department, on March 10, 1938, (R. 60) advised the only matter pending before it was the approval or disapproval of wills, also that any agreement made would have to be between the parties themselves, the only authority Department had was to approve or disapprove any agreement they might enter into (R. 70). Hook never discussed any settlement with petitioner except directing a letter to himself (copied R. 50) and forwarding same to Mr. Duncan, an attorney at Tulsa, Oklahoma, to have petitioner execute (R. 83). Petitioner, on being called, went to Mr. Duncan's office—no one was present to explain said letter to her, and she executed it (R. 99-100). Mr. Hook thereafter in presence of Departmental attorneys at Washington dictated an instrument and Mr. Flanery, Departmental attorney, caused to be inserted "catch-all" clauses, to-wit: "Or for any other reason or cause whatsoever." (R. 66) Mr. Hook, without submitting writing to his client but requesting they deal directly with him (R. 76) executed the instrument as her attorney, being the release (R. 16-17). The instrument, through Department, was then forwarded to Mr. Campbell and other attorneys with the right to make suggestions or to be more definite and certain or to cover additional subjects (R. 67). Said attorneys and clients ac-

cepted instrument as submitted, subscribed to same and returned it to Department where it was thereafter approved. Up to said time no administrator had been appointed, although a special administrator had (R. 63). Thereafter Mr. Walker and Mr. Taylor were appointed joint administrators (R. 84) and received $15,000 from Department and made application to court for permission to pay said sum to petitioner and obtained an *ex parte* order (R. 85). Application and order appear (R. 86-87). Administrators executed check (photostat, R. 27) in sum of $15,000.00 to Margaret Mashunkashey and Inghram D. Hook with endorsement thereon that it was in settlement of claims against estate. Check was delivered to Mr. Hook (R. 85). A controversy arose between Hook and petitioner before check was endorsed (R. 85, 93); Mr. Hook for himself and associates taking $10,000.00 and petitioner $5,000.00 (R. 96). Petitioner testified (R. 92) as follows:

> "My understanding was, I appointed Mr. Hook to get my will approved. I was accepting this money under the will, that was my understanding. I wouldn't try to appoint administrator."

This testimony is uncontroverted.

The controversy between Ben Mashunkashey, Pah-puson-tsa and James G. Blaine and petitioner which it is sought to have adjudicated herein arose as set forth in the bill of complaint (R. 13) by a petition being filed in County Court of Tulsa County in *Matter of Estate of Charles Mashunkashey, Deceased,* to determine his heirs; petitioner filed her pleading asserting she was surviving wife and an heir and asked to be so decreed. The three Osage Indians above named filed answer thereto, setting up the release and claiming that by reason of said instrument petitioner

was estopped from claiming and asserting any interest in the property; they also set up the further contention that petitioner was not of Indian blood and precluded from inheriting. County Court (R. 14) held it had no jurisdiction of controversy as to effect of release, as same was an independent transaction between Ben Mashunkashey, as an heir to a portion of estate, and Pah-pu-son-tsa and James G. Blaine who were not heirs on the one side, and petitioner, surviving spouse and an heir on other side; and not a controversy within the probate jurisdiction of County Court. Appeal was taken to District Court and said court advised it would hold as County Court had that it had no jurisdiction to adjudicate controversy between Ben Mashunkashey, Pah-pu-son-tsa and James G. Blaine on one side and petitioner on other relating to the release. Based on said facts, the United States alleged there was a controversy between itself and petitioner and sought a declaratory judgment (R. 15). Prior to trial the administrators of estate of Pah-pu-son-tsa, executrix of the will of Ben Mashunkashey and guardian of James G. Blaine intervened and were made parties by adopting petition of United States (R. 47).

The District Court held in favor of the government and against petitioner (R. 39-42). On appeal to the Circuit Court of Appeals, the judgment of the District Court was affirmed by an opinion (R. 104-109) without determining whether the controversy involved restricted property, but in effect, and contrary to the prior decisions of this court that the jurisdiction of the federal court was limited to restricted property, extended the jurisdiction to unrestricted property.

Specification of Errors to Be Urged.

The United States Circuit Court of Appeals for the Tenth Circuit erred:

I. In holding that the United States had authority to maintain said action.

II. In holding that the United States District Court for the Northern District of Oklahoma had jurisdiction of the subject-matter of said action, for the following reasons, to-wit:

(a) The succession to and the devolution of the real and personal property of decedent, Charles Mashunkashey, was controlled by the laws of the State of Oklahoma.

(b) Petitioner, as the surviving wife of Charles Mashunkashey, deceased, upon the death of said decedent, succeeded to and became vested immediately with an interest in and to the real and personal property owned by said decedent at the time of his death.

(c) Said interest in the real and personal property of said decedent, Charles Mashunkashey, to which petitioner succeeded and with which she became vested as the surviving wife of said deceased, was unrestricted and free from governmental control.

(d) The United States District Court for the Northern District of Oklahoma had no jurisdiction of the action, and had no jurisdiction to decree that petitioner had no interest in the unrestricted property that vested in her by operation of law, because no diversity of citizenship existed between the parties to said action.

III. In holding that an attorney, employed to obtain approval by the Secretary of the Interior of an Indian will,

had authority to barter away her unrestricted interest in the property that vested in petitioner by operation of law.

IV. By indirectly holding that Section 7 of Act of February 27, 1925, (43 Stat. 1008) governed the succession to and the devolution of the individual property of an Osage Indian, or, if applicable, in sustaining the power of Congress after statehood to regulate the descent of the individual property of Osage Indians.

Reasons Relied Upon for Allowance of Writ.

Petitioner herein shows that the decree and opinion complained of in sustaining the right of the United States to maintain an action upon behalf of Indian wards and confer jurisdiction upon the federal court of a local controversy involving no federal statute or rights created thereunder between citizens of the same state, the subject-matter of which relates to unrestricted property, free from control of the government, is of great public importance. While the courts have heretofore sustained the right to maintain such actions upon behalf of Indians and confer jurisdiction on the federal court where the subject-matter involved was restricted property, however where the property was unrestricted as in the case at bar, jurisdiction has always been denied.

Wherefore, petitioner respectfully prays that a Writ of *Certiorari* issue to the United States Circuit Court of Appeals for the Tenth Circuit.

NEAL E. MCNEILL,
STEPHEN R. LEWIS,
Attorneys for Petitioner.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF *CERTIORARI.*

Certiorari is sought to review an opinion by the United States Circuit Court of Appeals for the Tenth Circuit, not yet officially reported, which is set forth (R. 104-109) wherein said court affirmed a decree of the United States District Court for the Northern District of Oklahoma, entered without opinion. The decree appears (R. 39-42). The facts sufficient appear in petition for writ (pages 1-10).

The important question is not whether the United States or its Indian wards may pursue and have adjudicated the force and effect of the instrument demoninated a "release" (R. 16-17) or have adjudicated the question of whether petitioner has any further interest in land or personal property inherited by her from her deceased husband and title quieted against her, but whether the United States or its wards may pursue said right in the Federal courts of Oklahoma rather than in the state courts, as no federal question is involved and no diversity of citizenship exists.

The restrictions against bringing of local disputes in federal courts between individuals of the same state cannot be circumvented. *(City of Indianapolis* v. *Chase National Bank,* 314 U. S. 63-76, 62 S. Ct. 15-20.)

The court looks to the essential purpose of the bill in determining jurisdiction. *(Kelleam* v. *Maryland Casualty Co., et al.,* 312 U. S. 377, 61 S. Ct. 595.) At the outset, under the pleadings and admitted facts it is clear that the United States seeks to protect no right, nor alleges the invasion of any of its property rights. The sole purpose is to adjudicate rights or controversies between interveners, the Executor

and Administrators of Estates of two deceased Osage Indian wards and the Guardian of one Indian ward on the one side, and petitioner on the other, the subject-matter being real and personal property in which, under the facts and applicable law hereinafter stated petitioner has a vested interest by operation of law as the surviving wife, and said interest is unrestricted and free from government control.

The jurisdiction of the Federal Court to entertain this litigation, if sustained, must be under and by virtue of 36 Stat. 1091, 28 U. S. C., Sec. 41 (1) (Appendix 30), 28 U. S. C. A., Sec. 41 (1), which reads in part as follows:

> "The district courts shall have original jurisdiction as follows: First, of all suits of a civil nature, at common law or in equity, brought by the United States."

The above statute is very similar to the statute conferring original jurisdiction of certain controversies upon the Supreme Court of the United States, (Jud. Code, Title 28, U. S. C. A., Sec. 233, Stat. 1156) which reads in part as follows:

> "The Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature where a state is a party, etc."

The decisions of this court, in considering the jurisdiction of the national courts over a particular subject-matter under one of said statutes, have cited cases construing the other statute.

The right of the United States to maintain an action in its own behalf or for the use and benefit of third persons, including Indian wards, has been considered by this court in many decisions. The decisions are uniform in holding: The right of the government to maintain such action depends up-

on the same principles which would authorize a private citizen to apply to a court of justice for relief. *(United States* v. *San Jacinto Tin Co.,* 125 U. S. 273-280, 8 S. Ct. 850-857.) Where the government has no pecuniary interest and the action is brought for use of third person, it must appear either by pleading or evidence that the government is under a duty or obligation to the third person relating to the particular subject-matter to maintain the action. *(United States* v. *San Jacinto Tin Co., supra; United States* v. *American Bell Tele. Co.,* 128 U. S. 319-325, 9 S. Ct. 90-97.)

The above principles, however technical, have been adhered to by the government in bringing an action for Indian wards and where proper allegations exist or are established as to the above requirements, the court has sustained the right of the government to maintain an action relating to restricted property but has denied the right as to unrestricted property. In *Heckman* v. *United States,* 224 U. S. 413, 32 S. Ct. 424, wherein the bill described the property or identified the same with particularity, deraigning a restricted title in the Indian ward, asserting federal restrictions against encumbrance or alienation by the ward and violation of said federal restrictions, and the duty of the government to protect the Indian against alienation or encumbrance made in violation of said federal restrictions, the right was sustained. In *United States* v. *Osage County,* 251 U. S. 128, 40 S. Ct. 100, wherein relief was sought against taxes levied on restricted land. Although the lands were taxable, they were restricted as to alienation, it being alleged the tax levy was illegal as made by systematic and intentional disregard of state laws to destroy the rights of a whole class of non-competent Indians created by the Act of Congress, the right was sustained. In *LaMott* v. *United States,* 254 U. S. 570, 41 S. Ct. 204, to enjoin persons not

members of the tribe from intentionally and persistently obtaining leases upon lands of Indians without the approval of Secretary of the Interior in violation of federal statutes, rules and regulations, this court sustained the right as to restricted property but modified the decree as to lands that were unrestricted. In *Cramer* v. *United States,* 261 U. S. 219, 43 S. Ct. 342, the right was sustained to cancel patents wrongfully issued upon lands occupied by Indians to the railroad, citing therein with approval *United States* v. *Gray,* 201 Fed. 291, which sustained the right of the government to maintain an action upon behalf of Indian wards in an action to recover damages for a breach of lease contract made upon restricted property with approval of Secretary of the Interior, or "to protect or enforce any other Indian property right which remains under the control and supervision of the Secretary of the Interior or the Indian Agent or his subordinates." Also citing *United States* v. *Fitzgerald,* 201 Fed. 295, holding the government may maintain an action to enforce and protect its governmental rights; or as in *Mott* v. *United States,* 283 U. S. 747, 51 S. Ct. 642, in an action to recover restricted funds that had been obtained from the government fraudulently; or as in *Barnett* v. *United States,* 82 F. (2d) 765, wherein the United States sought to enjoin Mrs. Barnett "to prevent the use of a fraudulent and void marriage certificate and ceremony as evidence in future dealings between the United States and Anna Laura Barnett;" or as in *United States* v. *Goat,* 224 U. S. 458, 32 S. Ct. 544, being an action by the government to quiet title and cancel deeds made by freedman wherein the court sustained the right to maintain the action as to deeds made in violation of governmental restrictions. However, the court dismissed the action as to conveyances or

encumbrances made by the allottee after restrictions were removed.

In all the above decisions, the underlying principle—the right of the government to maintain the action upon behalf of its Indian wards, and to confer jurisdiction on the federal court in the absence of diversity of citizenship has been limited to restricted property, and, if the subject-matter related to unrestricted property, the action has been dismissed.

The exactness with which the court has followed the above decisions in determining the jurisdiction of the courts by first ascertaining and determining whether the controversy relates to unrestricted lands or property is exemplified in *United States* v. *Bond,* 108 F. (2d) 504 (10 C. C. A.), and *United States* v. *Fixico,* 115 F. (2d) 389 (10 C. C. A.). See also *United States, ex rel. Warren,* v. *Ickes,* 73 F. (2d) 844 (U. S. Dist. Ct. A. D. C.), in a controversy relating to Creek Indians, holding "supervision of Secretary of Interior over royalties collected under lease held to automatically cease upon removal of restrictions through death of only surviving son of full-blood allottee terminating son's special estate."

In *United States* v. *Minnesota,* 270 U. S. 181, 46 S. Ct. 298, involving the statute conferring jurisdiction on this court in actions where the state was a party, and the right of the government to maintain an action against the state brought on behalf of Indians, this court held "it must be conceded that, if the Indians are the real parties in interest and the United States only a nominal party, the suit is not within this court's original jurisdiction." It then, with particularity, analyzed the bill which contained proper allegations that the lands involved were Indian lands and had

been unlawfully patented to the state, and the United States, by reason of treaties and statutes, sustained a relation to the Indians which it was entitled to protect, citing, among other cases, *Heckman* v. *United States, supra.*

In construing the same statute relating to the original jurisdiction of this court, the court in *United States* v. *State of West Virginia,* 295 U. S. 463, 471, 475, 55 S. Ct. 789, 792, 793, stated (p. 470): "Nor is it enough to sustain the jurisdiction in such a case that a state has been made a party defendant. The bill of complaint must also present a 'case' or 'controversy' to which the state is a party, and which is within the judicial power granted by the judiciary articles of the Constitution." The court (p. 470) further stated: "The bill in present suit neither asks the protection nor alleges the invasion of any property right of the United States" or asserts title to the property necessary to remove a cloud upon the title, and (p. 474) "General allegations that the state challenges the claim of the United States that the rivers are navigable and asserts a right superior to that of the United States to license their use for power production, raise an issue too vague and ill-defined to admit of judicial determination," holding that unless the bill alleges a justiciable controversy between the United States and the State of West Virginia, the cause was not within the original jurisdiction of the court and dismissed the action. The court in said case further held that the Declaratory Judgment Act of June 14, 1934, c. 512, 48 Stat. 955 (28 U. S. C. A., Sec. 400), does not alter the character of controversies which are subject to the judicial power of the United States.

In the case at bar the bill alleges no title in either the United States or the Indian wards essential to an action to

quiet title. (See *United States* v. *State of West Virginia, supra; Frost* v. *Spitley,* 121 U. S. 553, 7 S. Ct. 1129; *Dick* v. *Foraker,* 155 U. S. 404, 15 S. Ct. 124. The bill fails to allege that the subject-matter involved herein is restricted property, and, unless it can be so decreed under the admitted facts, the trial court was without jurisdiction.

We now look to the status of the property involved in this controversy to ascertain whether it is restricted or unrestricted.

1. *The descent of lands and moneys of decedent was controlled by the laws of the State of Oklahoma.*

In *Jefferson* v. *Fink,* 247 U. S. 288, 38 S. Ct. 516, 62 L. ed. 117, it is held that upon the advent of statehood, under the general policy of Congress in allotting lands, the descent of Indian land in Oklahoma was according to the laws of the State of Oklahoma. In *Jackson* v. *Harris,* 43 F. (2d) 513, it was held:

> "Congress making Oklahoma Statutes control devolution of estate of Indians in Oklahoma, did not adopt Oklahoma Statutes as federal law, but merely provided the devolution should be in accordance with local law. (Act of June 16, 1906, c. 3335, Secs. 13, 21, 34 Stat. 267; Act of May 27, 1908, c. 199, Sec. 9, 34 Stat. 312.)"

The lands and moneys having descended according to local laws of Oklahoma, we look to local laws to ascertain when title vested in heirs on death of decedent, and who are his heirs.

2. *Applicable State Statutes.* The Supreme Court of Oklahoma, in *Davis* v. *Morgan,* 186 Okl. 30, 95 P. (2d) 856, held as follows:

> "On the death of an intestate, the vesting of title to intestate's property in the heirs is immedate."

The heirs, under the facts as stipulated, (R. 49) are fixed and controlled by Title 84, Section 213, O. S. 1931, which read, in part, as follows:

> "If decedent leave no issue, the estate goes one-half to the surviving husband or wife * * * but if there be no father or mother, then said remaining one-half goes, in equal shares, to the brothers and sisters of decedent * * *."

Under this statute, upon the death of decedent, his estate vested, under said law, one-half in petitioner, and one-half in Ben Mashunkashey; Pah-pu-son-tsa and James G. Blaine were not heirs and inherited no interest therein.

3. *Interest that vested in petitioner was unrestricted under and by virtue of Section 6, of Act of April 18, 1912* (37 Stat. 86) *wherein it is provided:*

> "That from and after the approval of this act, the lands of deceased Osage allottees * * * when heirs of such deceased allottees have certificates of competency or are not members of the tribe, the restrictions on alienation are hereby removed."

Petitioner not being a member of the tribe, restrictions were removed as to the interest in the real estate that vested in her. That under Section 4 of the Act of March 3, 1921 (41 Stat. 1249), which provides:

> "That from and after the passage of this act the Secretary of the Interior shall cause to be paid at the end of each fiscal quarter to each adult member of the Osage Tribe having a certificate of competency his or her pro rata share, either as a member of the tribe or heir of a deceased member, of the interest on trust funds, the bonus received from the sale of leases, and the royalties received during the previous fiscal quarter, * * *."

The funds in possession of the government and other personal property that vested in petitioner were unrestricted. (See *United States* v. *Mullendore,* 30 Fed. Supp. 13; *United States, ex rel. Warren,* v. *Ickes, supra.)*

It follows that under the facts above stated and the applicable law, the subject-matter involved in this controversy is the unrestricted interest in real and personal property that vested in the petitioner by operation of law, free from any supervision or control of the government, and, under the authorities heretofore cited, the Federal Court acquired no jurisdiction of the action by the government or on behalf of the Indian wards to divest her of that unrestricted title.

The opinion of the Court of Appeals concedes the Declaratory Judgment Act creates no new rights and the right of the government to maintain this action must be found in general law (R. 107). It cites *Heckman* v. *United States, supra* (R. 107). However, it overlooks the particularity it detailed the restrictions against alienation and the allegation the conveyance sought to be vacated was made in violation of those restrictions and the duty of the United States to protect the ward against conveyances made in violation thereof. No such facts are pleaded or established in case at bar, but, on the contrary, as to the release, the government established by evidence (R. 70) its only power in relation thereto was to approve or disapprove same. It follows that upon the approval of the instrument, in the absence of fraud or mistake, its duties and obligations ceased. Its jurisdiction over the funds delivered to administrators ceased in the absence of fraud or mistake. *(Hansen* v. *Hoffman,* (C. C. A. 10) 113 F. (2d) 780)

The opinion further cites *United States* v. *State of Min-*

nesota, supra. However, the court, in sustaining the right of the government to maintain the action alleged in the bill, asserted its duty and obligation to account to the Indians for lands or proceeds and that patents had been unlawfully issued to the state.

It further cites *McCarty* v. *Hollis, supra,* wherein the court held the government may maintain an appropriate action, but did not define "appropriate actions," except to cite *United States* v. *Heckman,* and similar cases.

The guardianship of the United States over Indian tribes is not a general guardianship, but is subject to the limitations inherent to such guardianship. *(United States* v. *Creek Nation,* 295 U. S. 103, 55 S. Ct. 681.) When applied to individual members, under the authorities heretofore cited, the guardianship only extends to restricted property or rights created under and based on some federal statute, and has no application to unrestricted property. *(LaMott* v. *United states, supra.)*

The Circuit Court of Appeals by its opinion has indirectly stricken down and held as surplusage all of the allegations and discussions in the opinions of the court in the above cases upholding the jurisdiction based on the theory the controversy related to restricted property and the duty of the government to protect Indians as to transactions made in violation of governmental restrictions. The opinion further, in support of jurisdiction (R. 107) cites *Strickland* v. *Peters,* (C. C. A. 5) 120 F. (2d) 53; *Eddy* v. *Eddy,* 168 Fed. 590. However, in both of those cases, the jurisdiction of the court was invoked by reason of diversity of citizenship which does not exist in the case at bar.

It is submitted that the Circuit Court of Appeals erred in holding the trial court had jurisdiction of the controversy,

and should have reversed the decision of the lower court with direction to dismiss for want of jurisdiction.

II.

On the Merits: If the court has no jurisdiction, the merits cannot be considered. The basis of government's action in the lower court to divest petitioner of her title was upon the theory of accord and satisfaction (R. 15) and the lower court so decreed (R. 41). However, in view of general law, 1 C. J. 527, that plea of accord and satisfaction has no application to method of acquiring property, this theory was not adopted by circuit court of appeals.

The tenure, transfer, control, acquisition and disposition of real property are matters which rest exclusively with the state where property lies. (*United States* v. *Fox,* 94 U. S. 315-320-321, 24 L. ed. 192; *Sunderland* v. *United States,* 266 U. S. 226-233, 45 S. Ct. 64) The method of acquiring real property in Oklahoma is regulated by statute, Title 60, Sec. 331, O. S. 1941, which reads as follows: "Property is acquired by *(1)* Occupancy; *(2)* Accession; *(3)* Transfer; *(4)* Will; or *(5)* Succession." To this may be added, to enforce right in court of equity, as specific performance or estoppel. The bill neither alleges nor asserts acquisition of the interest that vested in petitioner by Indian wards in any statutory manner. It is not contended the instrument was sufficient to constitute a conveyance or assignment. In the absence of proper allegation of superior title, or facts upon which to base superior title, the petition fails to state facts to support a judgment to quiet title. (*United States* v. *West Virginia, supra; Dick* v. *Foraker,* 155 U. S. 404, 15 S. Ct. 124; *Frost* v. *Spitley,* 121 U. S. 533, 7 S. Ct. 1129; *Smith* v. *Reneau,* 188 Okl. 629, 112 P. (2d) 160.)

The petitioner did not execute the instrument. It is

fundamental that an attorney employed to have a will approved (R. 37-38) before the Secretary of Interior has no authority to barter away property that vested in petitioner by operation of law, and the execution of the instrument denominated "Release" (R. 16) was not within the scope of the attorney's employment. *(Marlsbough* v. *Smith,* 11 Kan. 554; *Hamberger* v. *White,* 54 Okl. 736, 154 Pac. 576; *Scott* v. *Moore,* 52 Okl. 200, 152 Pac. 823)

The letter of petitioner to Mr. Hook, page 50, and the language therein "to settle my claim in and to the above estate" clearly has application to the claim for which said attorney was employed, to-wit: The approval of the will, and related to that subject-matter.

It is further fundamental: The court will not extend an instrument in settlement between heirs of interest in an estate to include property not incorporated therein in the absence of fraud or mistake. *(Riffe* v. *Walton,* 105 Kan. 227, 182 Pac. 640, 6 A. L. R. 549, Annotations 565)

Clearly the language "a settlement or waiver of 'claims against an estate," is not synonymous with nor does it include property that vests in an heir by operation or law, nor does it constitute a conveyance or assignment of said property.

The manner of conveyance of real estate or an interest therein is regulated in Oklahoma by statute, being Title 16, Section 4, O. S. 1941, copied in appendix herein, page 30.

An instrument affecting real estate made by attorney in fact is regulated by Title 16, Sections 3 and 20, O. S. 1941, copied in appendix herein, page 31.

The force and effect of these statutes have been construed by the Supreme Court of Oklahoma in *Herron* v. *Harbour,* 75 Okl. 127, 182 Pac. 243; *Soders* v. *Armstrong,* 172

Okl. 50, 44 P. (2d) 868, held that there must be a formal declaration or admission before officer authorized to take acknowledgment by the person who has executed the instrument before the power of attorney is sufficient.

The only authority Mr. Hook had was by virtue of the letter, (R. 50) which while signed was not sufficient in form nor properly executed so as to confer on Mr. Hook, as an attorney in fact for petitioner, authority to execute conveyances to real estate that vested in petitioner by operation of law upon the death of her deceased husband.

III.

The Application and Validity of Section 7 of the Act of Congress of February 27, 1925 (43 Stat. 1008): The Bill (R. 13) refers to the above section of the statute pleaded by the Indian wards as a defense in the County Court that petitioner was precluded from inheriting for the reason she was not of Indian blood. However, the Bill asserts no right by virtue of said statute. Petitioner denied the statute had any application to individual property of deceased Osage Indians, or, if so, contended that Congress was without power to pass legislation affecting titles already granted under previous allotment acts or to deprive decedent of the benefits of the laws of the state regulating descent of his individual property (R. 34-35).

The Circuit Court of Appeals in its opinion apparently does not base its opinion on said Congressional Act. However, it refers to the fact that the state District Court on appeal of heirship had decreed petitioner was not of Indian blood and therefore not an heir, and that an appeal was pending in the Supreme Court of Oklahoma (R. 106). It is not clear whether the Court of Appeals gave consideration

to said fact; however, it is proper to advise this court that the Supreme Court of Oklahoma has construed said statute as applicable herein, but that steps are now being taken to have said decision reviewed by this court.

Section 7 of the above statute reads as follows:

> "Hereafter none but heirs of Indian blood shall inherit from those who are of one-half or more Indian blood of the Osage Tribe of Indians *any right, title or interest to any restricted lands, moneys or mineral interests of the Osage Tribe:* Provided, that this section shall not apply to spouses under existing marriages." (Italics ours.)

The construction and application of every statute presents a problem in which words such as in the above statute, "any right, title or interest to any restricted lands, moneys or mineral interests of the Osage Tribe" derive validity from the aim and nature of the specific legislation. In ascertaining the scope of Congressional Legislation a due regard for a proper adjustment of the local and national interest in our federal scheme must always be in the background and no statute should be construed to radiate beyond the obvious meaning of the language, unless otherwise the purpose of the act would be defeated. *(Federal Trade Commission* v. *Bunte Bros.,* 312 U. S. 349, 61 S. Ct. 580.)

The Osage Tribe of Indians, as a tribe, possess and own certain lands exempt from allotment under Section 2 of the Osage Allotment Act (34 Stat. 539) and under Section 3 there is reserved the mineral rights. This title, however, is a communal title, no individual owning any interest in a separate tract. *(United States* v. *Sandoval,* 231 U. S. 28-35, 34 S. Ct. 1-6)

The individual members of the Osage Tribe own in

severalty their individual property, irrespective of whether competent or incompetent. Those without certificates of competency often own and possess *(a)* property free from governmental control; *(b)* property restricted to the extent owner cannot alienate and encumber same without consent of the Secretary of the Interior. *(LaMott* v. *United States, supra).* The descent of these two classes of individual property of Indians deceased since statehood, under Section 6 of the Osage Allotment Act, *supra,* which reads as follows:

> "That the lands, moneys and mineral interests herein provided for, of any deceased member of the Osage tribe shall descend to his or her legal heirs according to the laws of the Territory of Oklahoma, or of the state in which said reservation may be hereinafter incorporated, except where the decedent leaves no issue, nor husband nor wife, in which case said lands, moneys and mineral interests must go to the mother and father equally,"

is regulated and controlled by the laws of the State of Oklahoma. *(Jefferson* v. *Fink, supra; Jackson* v. *Harris, supra.)*

This court, in *Jefferson* v. *Fink,* held the purpose of the provisions of the Enabling Act was to admit Oklahoma into the Union with a set of laws uniform throughout the state, and by such provisions it was the intent or purpose that the descent of individual property of all Indians deceased since statehood should be in accordance with state laws. Congress by the Enabling Act and the Allotment Act, *supra,* in adjustment of local and national interest provided the descent of property of Indians was of local concern and of state cognizance in accordance with general law. *(Cope* v. *Cope,* 137 U. S. 682, 11 S. Ct. 222, recognized in *Sunderland* v. *United States,* 266 U. S. 226, 45 S. Ct. 64.) The individual members

had no interest in tribal property that passed by succession, except rights referred to as "headrights." *(Globe Indemnity Company* v. *Bruce,* 81 F. (2d) 143.) The right to regulate the alienation or encumbrance of property designated as restricted was of national concern by reason of the government's guardianship, and was reserved to Congress.

It is a cardinal rule in the construction of statutes that a new statute of a fragmentary nature must be construed as intended to fit harmoniously into the existing system unless a contrary legislative purpose is plainly indicated. *(United States* v. *Barnes,* 222 U. S. 513, 32 S. Ct. 117; *Gay* v. *Ruff,* 292 U. S. 25, 54 S. Ct. 608, 92 A. L. R. 970.) Under the harmonious system existing prior to the enactment of this statute, the Congress has evidenced an intent since the general allotment Act of 1887 to provide that the descent of land should be according to local law. *(Jefferson* v. *Fink, supra.)* Clearly, there is no language in this act that plainly indicates an intent to depart from that system which had been consistently followed by Congress.

It is a further fundamental rule of law that repeals by implication are not favored and none will be inferred unless the intent is clear and manifest. *(United States* v. *Burroughs,* 289 U. S. 159, 53 S. Ct. 574; *Washington* v. *Miller,* 235 U. S. 422, 35 S. Ct. 119; *Cope* v. *Cope,* 137 U. S. 682, 11 S. Ct. 222; *United States* v. *Borden Co.,* 308 U. S. 182, 60 S. Ct. 182)

The Act of February 27, 1925, *supra,* contains no repealing clause and clearly there is no intent to repeal the provisions of Section 6 of the Osage Allotment Act, *supra,* providing that the lands shall descend according to the laws of the State of Oklahoma, nor to repeal the provisions of Sections 13 and 21 of the Enabling Act, *supra,* regulating

the laws of descent, which congress intended, as held in *Jefferson* v. *Fink, supra,* to regulate the descent of property of Indians deceased since statehood.

Clearly Congress by using the language "lands, moneys and mineral interests of the Osage tribe" did not intend same to be synonymous with the individual property of the members of the tribe but, as the language imports, intended that it relate to tribal property should the same thereafter be distributed. True, in *Washington* v. *Miller, supra,* in construing a proviso to Section 6 of the Supplemental Creek Agreement, the court held that the use of the term "lands of the Creek Nation" related to the individual allotments. However, at the time of the passage of the act, all lands were those of the Creek Nation. This is far from holding that an Act of Congress which is passed more than fifteen years after the rigths of the individual Indian became vested with a fee simple title, in referring to that land would refer to it as the "lands of the Osage Tribe of Indians." In the instant case the pleadings disclose there is land involved which is located in Tulsa, Oklahoma—no part of Osage Nation and never was. To extend this language to include individual property of the Indian or to include property purchased which had never belonged to the Osage Tribe is contrary to fundamental rules of construction.

The Power of Congress. The several states of the Union possess the power to regulate the descent of real and personal property within their respective limits. *(United States* v. *Fox,* 94 U. S. 315, 24 L. ed. 193; *Cope* v. *Cope, supra; Sunderland* v. *United States, supra.)*

Upon admission of a state into the Union, "Congressional regulations in an enabling act which a state is required to and does assent to as a condition to admission

into the Union remain in force after such admission if, and only if, the subject is one within the regulating power of Congress." *(United States* v. *Sandoval, supra.)*

On admission of Oklahoma into the Union under the Enabling Act *(supra)* with the same power and authority as the original states, Congress reserved no power to pass local laws or amend the laws of the state. *(Coyle* v. *Smith, Sec'y of State,* 221 U. S. 559, 31 S. Ct. 688; *South Carolina* v. *United States,* 199 U. S. 439, 26 S. Ct. 110; *Butler* v. *United States,* 297 U. S. 1, 56 S. Ct. 312; *Carter* v. *Carter Coal Co.,* 298 U. S. 238, 56 S. Ct. 855.)

The laws of descent and distribution of property being local laws *(Jefferson* v. *Fink, supra)* Congress is without power to repeal or amend the laws of the State of Oklahoma regulating the descent and distribution of property of Indians which had been delegated to the state under and by virtue of the Osage Allotment Act and the Enabling Act. It would seem clear that Congress, after the admission of Oklahoma into the Union in 1907, had no authority in 1925 to regulate or control individual property of Osage Indians which had been delegated to the state under the Enabling Act and Osage Allotment Act.

If this statute should be applicable to the individual property of the Indian, it being an exception to the general rule of descent and distribution, the burden is upon the United States to show not only its applicability but the petitioner is not of Indian blood. *(United States* v. *Cook,* 17 Wall. 168, 21 L. ed. 536; *Schlemmer* v. *Buffalo, Rochester & Pittsburgh Ry. Co.,* 205 U. S. 1, 27 S. Ct. 407; *United States* v. *King & Howe,* 78 F. (2d) 693.)

IV.

The Writ of Certiorari Should Issue. From the record it is clear that the District Court was without jurisdiction of the subject-matter, being a local controversy solely between citizens of the state. The subject-matter related to the unrestricted interest in real and personal property that vested in petitioner by operation of law on the death of her deceased husband. The Circuit Court erred in holding the Federal Court had jurisdiction of said subject-matter and controversy.

If the opinion of the Circuit Court is permitted to stand and the jurisdiction of the federal court is extended to include all controversies relating to property of an Indian, irrespective of whether it is restricted or unrestricted, a flood-gate is opened for a new and different type of litigation in Federal Courts—all suits the United States might seek to maintain relating to property of Indians over which it has no control or supervision—.

The question of jurisdiction of the Federal Court over such controversies is of general importance. The right to the writ is fully supported by the cases heretofore cited.

Respectfully submitted

NEAL E. MCNEILL,
STEPHEN R. LEWIS,
Attorneys for Petitioner.

APPENDIX.

36 Stat. 1091, 28 U. S. C. Sec. 41(1), 28 U. S. C. A., Sec. 41(1):

> "Any suit of a civil nature, at law or in equity, arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, of which the District Courts of the United States are given original jurisdiction by Part I of this title, in any state court, may be removed by the defendant or defendants therein to the District Court of the United States for the proper district. Any other suit of a civil nature, at law or in equity, of which the District Courts of the United States are given jurisdiction, by Part I of this title, in any state court, may be removed into the District Court of the United States for the proper district by the defendant or defendants therein, being non-residents of that state. And when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different states, and which can be fully determined as between them, then either one or more of the defendants actually interested in such controversy may remove said suit into the District Court of the United States for the proper district," etc.

Title 16, Section 4, O. S. 1941:

> "No deed, mortgage or other conveyance relating to real estate or any interest therein, other than for a lease for a period not to exceed one year, shall be valid until reduced to writing and subscribed by the grantors; and no deed, mortgage or contract relating to the homestead exempt by law, except a lease for a period not exceeding one year, shall be valid unless in writing and subscribed by both husband and wife, where both are living and not divorced, or legally separated except to the extent hereinafter provided."

Title 16, Section 3, O. S. 1941:

"Any instrument affecting real estate may be made by an attorney in fact, duly appointed and empowered as hereinafter provided."

Title 16, Section 20, O. S. 1941:

"A power of attorney in fact for the conveyance of real estate or any interest therein, or for the execution or release of any mortgage therefor, shall be executed, acknowledged and recorded in the manner required by this chapter for the execution, acknowledgment and recording of deeds and mortgages, and shall be recorded in the county where the land is situated, and no deed, mortgage or release of a mortgage executed by an attorney in fact shall be received for record or recorded until the power under which the same is executed has been duly filed for record in the same office; and the recording of any deed, mortgage or release of mortgage shall be of no effect for any purpose until the power under which it is executed has been duly filed for record in the same office."

(24)

FEB 1 1943
CHARLES ELMORE CROPLEY

No. 649

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1942

Margaret Mashunkashey, now Bradshaw, *Petitioner*,

vs.

United States of America, A. G. Williams, Guardian of James G. Blaine, jr.; Mamie Mashunkashey, Executrix of the Estate of Ben Mashunkashey, Deceased; and L. M. Colville and John W. Keith, Joint Administrators of the Estate of Pah-pu-son-tas, Deceased. *Respondents.*

Brief of Respondents in Opposition to Petition for Writ of Certiorari

On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Tenth Circuit

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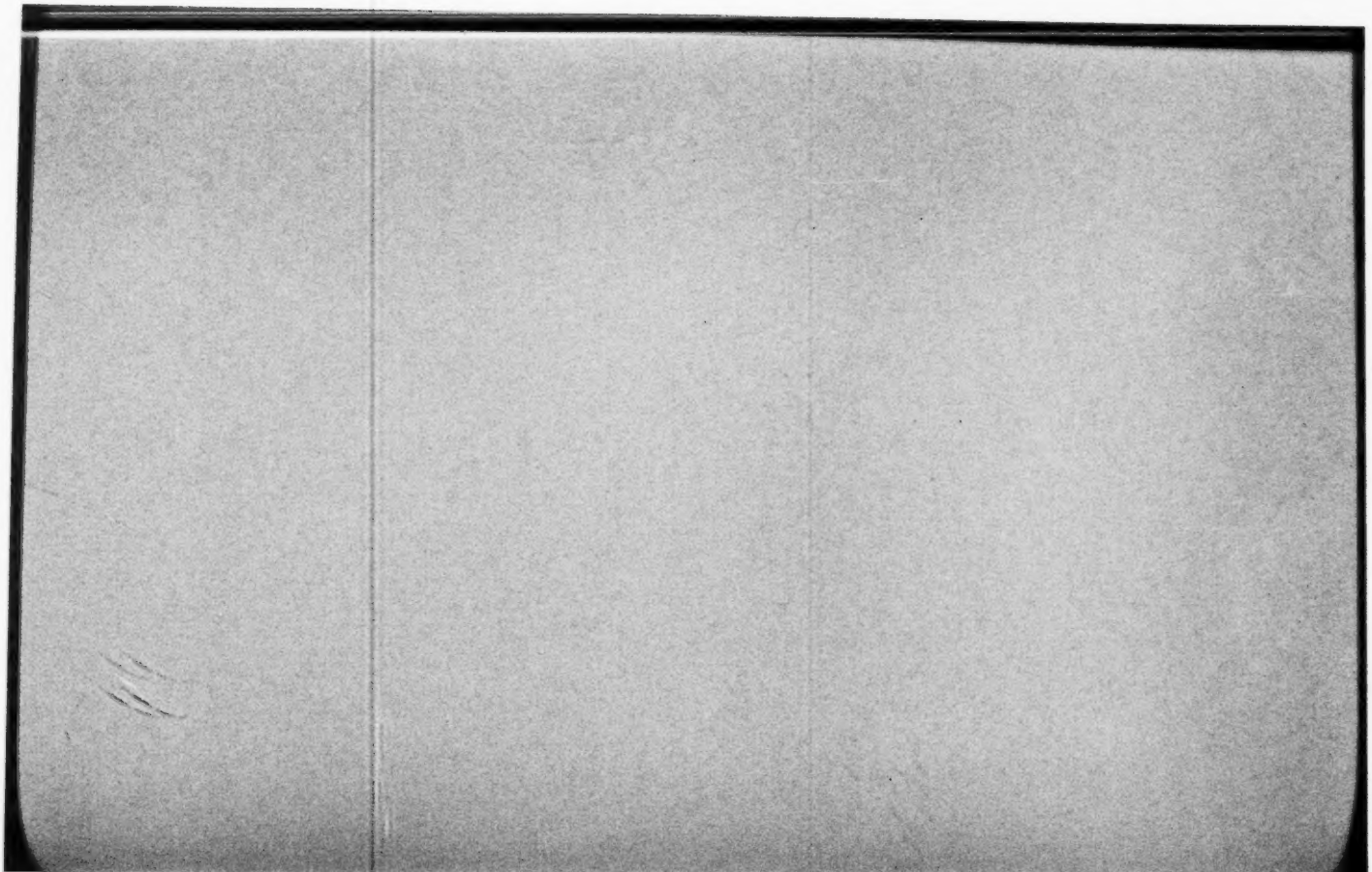

INDEX

Subject — Page

BRIEF OF NAMED RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI ---- 1

I. Respondents Named ---- 1

II. Rule of Court ---- 1

III. Summary statement ---- 2

IV. Summary holding The Court of Appeals ---- 3

V. Argument Jurisdictional Question ---- 3

(1). Argument Petitioner based on false premise ---- 3
(2). Release ---- 4
(3). Vital concern to have adjudication rights of Indian wards ---- 5
(4). Petitioner's claim Indian blood another proceeding ---- 5
(5). Federal Court authority to determine validity of release ---- 6
(6). Rule same jurisdiction by authority of Government or because of diversity of citizenship ---- 8
(7). Estate did not vest in petitioner ---- 8
(8). Petitioner did not succeed to estate by will or by Indian blood ---- 9

VI. On the merits ---- 9

1. Petitioner's point No. III no place in this case ---- 10
2. Applicability and validity Sec. 7, Act. of Congress February 27, 1925 (43 Stat. L. 1008) decided ---- 10

CONCLUSION ---- 11

REFERENCE TO STATUTES

Construction of Act of Congress February 27, 1925 (43 Stat. L. 1008) by Comptroller General of the United States ---- 6 (A-15967)

Section 7 of Act of Congress of February 27, 1925 (43 Stat. L. 1008) ---- 10

TABLE OF CASES

Byers v. McAuley, 149 U. S. 608, 13 Sup. Ct. 906, 37 L. Ed. 867 ---- 8
Cramer v. United States, 261 U. S. 219, 67 L. Ed. 622 ---- 5
Eddy v. Eddy, 168 F. 590 ---- 6
Farrell v. O'Brien, 199 U. S. 89, 25 Sup. Ct. 727, 50 L. Ed. 101 ---- 8
Mashunkashey v. Mashunkashey, The Journal Oklahoma Vol. 13. No. 40 p. 1229, Oct. 3, 1942 (not officially reported) ---- 10
Payne v. Hook, 7 Wall. 425, 19 L. Ed. 260 ---- 8
Yonley v. Lavender, 21 Wall. 276, 22 L. Ed. 536 ---- 8
White House Lumber Co. v. Howard, 142 Okl. 163, 286 P. 327 ---- 4

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1942

No. 649

Margaret Mashunkashey, now Bradshaw, *Petitioner,*

vs.

United States of America, A. G. Williams, Guardian of James G. Blaine, jr.; Mamie Mashunkashey, Executrix of the Estate of Ben Mashunkashey, Deceased; and L. M. Colville and John W. Keith, Joint Administrators of the Estate of Pah-pu-son-tsa, Deceased, *Respondents.*

BRIEF OF RESPONDENTS

To the Honorable, the Supreme Court of the United States:

The respondents A. G. Williams, guardian of James G. Blaine, Jr., Mamie Mashunkashey, executrix of the estate of Ben Mashunkashey, deceased, and L. M. Colville and John W. Keith, joint administrators of the estate of Pah-pu-son-tsa, deceased, respectfully object to the granting of the petition for writ of certiorari, and submit this brief in opposition thereto.

Rule of Court.

Section 5 of Rule 38 of the Rules adopted February 13, 1939.

"A review on a writ of certiorari is not a matter of

right, but of sound judicial discretion, *and will be granted only where there are special and important reasons therefore.*" There is no special or important reason therefor in this case.

Statement.

These respondents were permitted to intervene in the action as originally filed and were made parties thereto. (R. 47). The complaint (R. 9) recited in the beginning thereof that the action was brought and prosecuted "at the special direction of the attorney general of the United States of America and at the request of the Secretary of the Interior of the United States, for and on behalf of the United States and for and on the further behalf of Ben Mashunkashey, Osage allottee No. 457, Pah-pu-scn-tsa, Osage Allottee No. 520, and James G. Blaine, Jr., Osage Allottee No. 431. The complaint further alleged (R. 10) that the said Ben Mashunkashey, Pah-pu-son-tsa and James G. Blaine were restricted members of the Osage Tribe of Indians, and (R. 11) that during his lifetime Charles Mashunkashey (the decedent whose estate is involved in this case) was a full blood, restricted member of the Osage Tribe of Indians, and that the property of which he died seized was property held in trust by the United States and was restricted property. The fact as to the restricted status of Charles Mashunkashey and of his property was stipulated (R. 48), except for a modification as to certain purchased property.

The Decision Below.

The Court of Appeals (R. 104-109) held:

First. That the government not only has the power to institute actions to preserve the rights of its wards, but that it is its duty to do so when those rights are threatened.

Second. That the Federal District Court had the power to determine the validity and effect of the release given by petitioner.

Third. That the release referred to effected a complete settlement of all of petitioner's right, title and interest in and to the estate of the deceased.

Fourth. That petitioner's letter to her attorney clearly authorized him to settle her claim to the estate.

Argument.

There is but one question which relates itself to the propriety of the granting of certiorari in this case, as we view this matter. That question is, whether the United States District Court for the Northern District of Oklahoma had jurisdiction to render a declaratory judgment under the facts and circumstances related in the above statement. We believe this question is too well settled to require extensive argument or citation of authorities.

A great part of the argument of petitioner is based upon the false premise that upon the death of Charles Mashunkashey she inherited his property and the same thereupon became unrestricted. Petitioner has not been determined to

be an heir of Charles Mashunkashey. The property being restricted at the time of the death of Charles Mashunkashey, the same was under the control of the Secretary of the Interior, and it was his duty to see that the rights of the wards of the government, Osage Indian heirs of Charles Mashunkashey, were protected. It is quite true that Oklahoma state courts alone have the power to determine who the heirs of Charls Mashunkashey are, but pending such final determination the federal government has the right and the duty, on behalf of its Indian wards, to protect the estate against one with whom it has dealt in effecting a settlement of such person's claim in and to the estate.

Assuming, however, for the purpose of argument only, that petitioner, but for the release of her claim, would ultimately be determined to be an heir to said estate, until such determination there is no passing of title and the property of the estate remains in the custody and under the control of the Secretary of the Interior.. In *White House Lumber Co. v. v. Howard,* 142 Okl. 163, 286 P. 327, the Supreme Court of Oklahoma said:

> "The right of an heir to real estate in this state of an intestate is governed by the law of this state (section 8400, C. O. S. 1921), and is acquired by succession as provided by the law of this state (section 8552, C. O. S. 1921.) The probate procedure of the state controls the manner of passing of the title to the real estate, and the heir is dependent for his title, not only upon the statutes of succession (article 4, c. 93, C. O. S. 1921), but upon the probate procedure for the determination and distribution thereof."

If, moreover, as the government contends in this case, the petitioner released whatever right in and to said estate that she may have had, it was of vital concern to the government to see that the validity of such release was properly adjudicated and determined so that the rights of its Indian wards would be properly protected and conserved, particularly in view of the fact that the state courts were refusing to assume jurisdiction to pass upon the question of the validity of the release.

In *Cramer v. United States*, 261 U. S. 219, 67 L. ed. 622, 627, this court said:

> "The contention that the United States was without authority to maintain the suit in the capacity of guardian for these Indians is without merit. In United States v. Kagama, 118 U. S. 375, 383, 384, 30 L. ed. 228, 231, 6 Sup. Ct. Rep. 1109, the general doctrine was laid down by this court that the Indian tribes are wards of the nation, — communities dependent on the United States. 'From their very weakness and helplessness, so largely due to the course of dealing of the Federal government with them and the treaties in which it has been promised, there arises the duty of protection, and, with it, the power.' This duty of protection and power extends to individual Indians, even though they may have become citizens."

While the question of heirship is not before this court, it should be noted that petitioner has been claiming to be of Indian blood and therefore not precluded from inheriting in the estate of the deceased, although in this proceeding she is now contending that Section 7 of the Act of Congress approved February 27, 1925, (43 Stat. L. 1008), which pro-

hibits all persons not of Indian blood from inheriting from Osage Indians of one-half or more Indian blood, is invalid. Construing the effect of this statute the Comptroller General of the United States, on November 2, 1926, said (A-15967):

> "While this provision is primarily for the consideration of the local court in which the heirship is determined, the Secretary of the Interior in his administration of the affairs of the Osage Indians, should see that this section is taken into consideration by the court in the determination of the proper heirs in any given case, so that payment of any funds in the treasury of the United States to the credit of a deceased Indian shall be made only to persons properly entitled thereto under the law."

The authority of the Federal court in this case to construe and determine the validity of the release given by the petitioner is well supported by the case of Eddy v. Eddy, 168 F. 590. In that case the complainant "sought the rescission of an instrument in which she had signified her acceptance of the provisions made in her behalf by the last will and testament of her deceased husband, Charles K. Eddy, and released all other claims against his estate," alleging that the release was obtained by fraud and undue influence. In passing upon the authority of the Federal court to determine the validity of the release in that proceeding the Circuit Court of Appeals for the Sixth Circuit said:

> "It is undoubtedly true that, when the matter in controversy is one within the exclusive jurisdiction of the probate court, the courts of the United States will not assume jurisdiction. They will not take cognizance of

the purely administrative proceedings in the settlement of estates of deceased persons. Nor will they invade the possession of the assets taken by those courts for the purposes of administration. But when a citizen of one state has a claim upon the estate of a deceased person situated in another state, or a matter of controversy with a citizen of such other state who represents, or has an interest in, the estate, and whether such claim be of a legal or equitable nature, he has a right under the Constitution and laws of the United States to come into its courts for a remedy, and of this right he cannot be deprived by any law of the state. Such a right is a matter in controversy in the case before us. It is not necessary to its determination that the court should take the possession of any property out of the hands of the probate court. The complainant seeks the rescission of an instrument which she says these defendants have unjustly and by inequitable means obtained from her and the use of which will harm her in the probate court. That court has not plenary equitable jurisdiction whereby it could give her relief; and, if it had, that would not exclude the jurisdiction of the federal court. It would simply establish it as a court of co-ordinate authority with the federal court, and the complainant, being a citizen of another state, would still have the right to go into the federal court for relief. The right and power to determine the controversy between the parties rested in the Circuit Court of the United States, and it could proceed to that extremity without exciting any conflict with the probate court. When that is done, the claim is presented to the probate court as one adjudicated, and upon the footing of the adjudication the court will respect it in ordering the disposition of the assets of the estate. Thus the rights of all the parties are in due form of law, and, without the invasion of the province of any court, enforced. This outline of the respective provinces of the federal courts and the probate courts of the states

> is deduced from a number of decisions of the Supreme Court, among which we may refer to: Payne v. Hook, 7 Wall. 425, 19 L. Ed. 260; Yonley v. Lavender, 21 Wall. 276, 22 L. Ed. 536; Byers v. McAuley, 149 U. S. 608, 13 Sup. Ct. 906, 37 L. Ed. 867; Farrell v.O'Brien, 199 U. S. 89, 25 Sup. Ct. 727, 50 L. Ed. 101. This contention of the appellees must therefore be overruled."

It can make no difference that jurisdiction in that case was because of diversity of citizenship. The same rule would apply where jurisdiction results from the right and duty of the government to maintain actions in the federal courts for and on behalf of its Indian wards.

At page 19 of her petition for writ of certiorari petitioner states that:

> "The funds in possession of the government and other personal property that vested in petitioner were unrestricted."

This unqualified position that the estate vested in her upon the death of Charles Mashunkashey is the foundation of petitioner's entire argument. Aside from the point already mentioned, that she was dependent for her title upon probate procedure, petitioner could succeed to the estate of Charles Mashunkashey in one of three ways: (1) under the will of the decedent; (2) by proof of her being of Indian blood, and hence not prohibited from inheriting by section 7 of the Act of Congress approved February 27, 1925; or (3) by establishing the invalidity of said section 7.

The will of Charles Mashunkashey has been disapproved by the Secretary of the Interior, and is therefore ineffective

to pass title to petitioner. She has been determined not to be of Indian blood by the District Court of Tulsa County, Oklahoma (see footnote 3 to opinion of Circuit Court of Appeals, R. 106). That judgment has now been affirmed by the Supreme Court of Oklahoma. *The Journal, Vol. 13, No.* 40, p. 1229, of October 3, 1942.

It thus appears not only that petitioner did not succeed to the estate of Charles Mashunkashey either by will or by reason of her Indian blood, but that whatever claim she had in or to the estate was built upon the sand. It was this nebulous claim which she was paid $15,000 for releasing, and she is in poor position now to make the bold contention that the entire estate passed to her as unrestricted property.

Merits.

Here, again, petitioner bases her point No. II upon the premise that she had title to the estate of Charles Mashunkashey, deceased, and from that premise argues that a formal conveyance would be necessary to divest her of such title. We have called attention above to the case of *White House Lumber Co. v. Howard*, in which it was held that title of an heir to real estate is dependent upon probate procedure. If the probate court, prior to the giving of the release in question, had determined that petitioner was an heir to the estate and had by its decree vested the property in her and that judgment had become final, then petitioner's position would be sound. But as the matter stood at the time the release was given, petitioner had at best only a claim of heirship, and the judgment of the state district court and the decision of the

Oklahoma Supreme Court show that her claim, wholly independently of the release, was without foundation.

We have no fault to find with the cases cited under this point in the brief of petitioner, but no case is cited, and we believe none can be found, holding ineffective a release such as that given by petitioner.

As to petitioner's point No. III, relating to the applicability and validity of section 7 of the Act of Congress of February 27, 1925 (43 Stat. 1008), we believe these questions have no proper place in this case. The issue before the District Court was the validity of the release, and its validity or invalidity was in no way dependent upon the applicability or validity of the section referred to.

Furthermore, both the applicability and the validity of said section 7 was in issue in the probate proceedings in the estate of Charles Mashunkashey, and in the case styled *Masunkashey v. Mashunkashey*, above referred to as found in *The Journal*, Vol. 13, No. 40, p. 1229, the Supreme Court of Oklahoma said in the syllabus:

> "1. Under the provisions of section 1 of the Enabling Act (34 Stat. 267), the power to legislate with respect to the devolution of Indian lands and property was reserved to the federal government.
>
> "2. Section 7 of the Act of Congress of February 27, 1925, limiting the right to inherit the property of Osage Indians of one-half or more Indian blood to heirs of Indian blood, is a valid exercise of the legislative powers of the Congress.

"3. Where there is conflict between state law and federal legislation, which is within the exclusive sphere of federal authority, the state law is superseded.

"4. Section 7, supra, applies to the restricted lands moneys, and mineral interests of individual Osage Indians.

"5. Record examined, and held, that the finding of the trial court that the surviving wife of decedent is not of Indian blood is not contrary to the clear weight of the evidence."

At page 24 of her brief petitioner says that "steps are now being taken to have said decision reviewed by this court." Whether or not that decision should be reviewed is not for present consideration, but certainly the applicability or validity of section 7 has nothing to do with the questions now before the court in this case.

We believe that no good reason for granting certiorari in this case has been shown, and that the petition therefor should be denied.

Respectfully submitted,

JOHN L. ARRINGTON
RALPH A. BARNEY
Attorneys for Respondents A. G. Williams, guardian of James G. Blaine, Jr., Mamie Mashunkashey, executrix of the estate of Ben Mashunkashey, deceased, and L. M. Colville and John W. Keith, joint administrators of the estate of Pah-pu-son-tsa, deceased.

INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Statement	2
Argument	7
Conclusion	10

CITATIONS

Cases:

Caesar v. *Burgess*, 103 F. 2d 503	8
Cramer v. *United States*, 261 U. S. 219	7
Heckman v. *United States*, 224 U. S. 413	7
In re Martin's Estate, 183 Okla. 177	8
In re Smith's Estate, 188 Okla. 158	8
In re Thompson's Estate, 179 Okla. 240, certiorari denied, 302 U. S. 718	8, 9
Jefferson v. *Fink*, 247 U. S. 288	8
McCurdy v. *United States*, 246 U. S. 263	7
Morrow v. *United States*, 243 Fed. 854	7
Scott v. *Beams*, 122 F. 2d 777, certiorari denied, 315 U. S. 809	9
Strickland v. *Peters*, 120 F. 2d 53	8
Taylor v. *Tayrien*, 51 F. 2d 884, certiorari denied, 284 U. S. 672	8
United States v. *Minnesota*, 270 U. S. 181	7
United States v. *Osage County*, 251 U. S. 128	8
United States v. *Pumphrey*, 11 App. D. C. 44	7
Vinson v. *Cook*, 76 Okla. 46	10
Washington v. *Miller*, 235 U. S. 422	8
White House Lumber Co. v. *Howard*, 142 Okla. 163	9

Statutes:

Act of June 28, 1906, sec. 6, 34 Stat. 539	9
Act of April 18, 1912, 37 Stat. 86:	
Sec. 3	9
Sec. 8	3
Act of February 27, 1925, sec. 7, 43 Stat. 1008	8

Miscellaneous:

Note 6 A. L. R. 555 (1919)	10
38 A. L. R. 759 (1920)	10
54 A. L. R. 976 (1927)	10

In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 649

MARGARET MASHUNKASHEY, NOW BRADSHAW,
PETITIONER

v.

THE UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The district court did not write an opinion. Its journal entry of judgment appears at R. 39–42. The opinion of the Circuit Court of Appeals (R. 104–109) is reported in 131 F. 2d 288.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered October 16, 1942 (R. 109). A petition for rehearing, filed November 21, 1942,

was denied December 9, 1942 (R. 127). The petition for a writ of certiorari was filed January 12, 1943. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the United States may maintain an action on its own behalf, and on behalf of certain restricted Osage Indians, who are claimants to the estate of another restricted Osage Indian, to obtain a declaratory judgment as to the validity and effect of a release by his widow of all claims against the estate.

2. Whether petitioner's attorney was authorized to release her claims in and to her husband's estate.

3. Whether the release executed by petitioner's attorney on her behalf released all her claims in and to her husband's estate.

STATEMENT

This action was instituted by the United States on its own behalf and on behalf of certain full-blood, restricted Osage Indians against Margaret Mashunkashey, now Bradshaw (hereinafter referred to as petitioner), and was brought for the purpose of obtaining a declaratory judgment as to the validity and effect of a release dated March 31, 1938, executed on behalf of petitioner by Inghram D. Hook, her attorney. The relevant facts may be summarized as follows:

Charles Mashunkashey, a full-blood, restricted Osage Indian, died on June 10, 1934 (R. 49). He was survived by his widow (the petitioner) and the Indian claimants (R. 49). The property of the decedent was restricted (R. 48). He left a will, under the terms of which (R. 101) his widow was to receive all his property with the exception of a small bequest to his half-brother, one of the claimants. Under Section 8 of the Act of April 18, 1912, 37 Stat. 86, the validity of this will was contingent upon its approval by the Secretary of the Interior, and petitioner, on May 16, 1936, entered into a written contract with Inghram D. Hook, an attorney, to represent her "in connection with the contest over the will" (Ex. "A" attached to complaint, R. 37; R. 91). On June 14, 1937, the Secretary of the Interior disapproved the will (R. 49).

On April 1, 1938, Hook filed a petition for rehearing before the Secretary of the Interior (R. 49) and during the pendency of this rehearing negotiations were entered into between counsel for the Indian claimants, on the one hand, and Inghram D. Hook, representing the petitioner, on the other, for the purpose of settling any claims that petitioner might have (R. 53, 71–73). The attorney for the petitioner was willing that his client (for a consideration of $15,000.00) should release any possible claim "in or to the estate of Charles Mashunkashey, * * * either by reason of his will or by reason of being his wife," and should

state that she was not of Indian blood and would make no claim to the estate on that ground (tentative release, Ex. IV–F, R. 59–60). The attorneys for the other claimants wanted petitioner also to release her right to administer the estate (R. 56–57).

On March 22, 1938, petitioner specifically authorized her attorney "to settle my claim in and to the above entitled estate for the sum of $15,000.00" and "to say to the Interior Department that I will not make any claim to be general administrator" (Govt. Ex. 1, R. 50).[1]

On March 31, 1938, as a result of a conference between interested counsel and officials of the Interior Department, the final release here involved (Govt. Ex. "A", R. 16)[2] was drafted. The instrument provides that petitioner "hereby releases, discharges and acquits the estate of the said Charles Mashunkashey from any and all claims which she may have against said estate by reason of being the widow of Charles Mashunkashey, or for any other reason or cause whatsoever, and she relinquishes and releases any claim she may have to be the general administratrix or to name or designate the general administrator of said estate for and in consideration of the payment of

[1] Referred to as "Exhibit 3 or III" in the testimony of William H. Flanery, R. 66–70, and Nathan R. Margold, R. 71–77.

[2] Referred to as "Exhibit 2 or II" in the testimony of William H. Flanery, R. 66–70, and Nathan R. Margold, R. 71–77.

the said $15,000". The release was signed by Hook as attorney for petitioner on March 31, 1938, and by the other claimants and their counsel on April 4, 1938. It was approved by the Assistant Secretary of the Interior on April 12, 1938 (R. 17), on which date he reaffirmed his disapproval of the will (R. 63).

Administration on the estate of Charles Mashunkashey was then sought in the County Court of Tulsa County, Oklahoma, and administrators were appointed. On May 17, 1938, Hook filed an application in the county court in which he stated that petitioner had released "all her rights, claims, and interest in the estate" for $15,000, and requested an order directing payment of that amount "to Margaret Mashunkashey and her attorney of record, Inghram D. Hook" (R. 89–90). The court granted the application (R. 90). On June 6, 1938, after the Assistant Secretary of the Interior had authorized the Superintendent of the Osage Agency at Pawhuska, Oklahoma, to pay the administrators $15,000 out of the restricted funds of Charles Mashunkashey (R. 65), a check in that amount was drawn by the administrators to the order of petitioner and her attorney, Inghram D. Hook (R. 27). Two or three days later, petitioner and her attorney endorsed this check and received the money therefor (R. 94–95).

On December 12, 1938, petitioner, by a different attorney, intervened in the administration pro-

ceedings in the County Court of Tulsa County claiming that she was the sole heir of decedent by virtue of being his surviving wife (R. 13, 34). The other claimants filed their answers setting up the release executed by petitioner, and also denied that she was of Indian blood. The county court, at the instance of petitioner, held that it had no jurisdiction to construe the release, and entered judgment declaring petitioner to be an heir (R. 13, 14, 35, 36). On appeal by the other claimants, the District Court of Tulsa County, after argument, indicated that it was likewise of the opinion that the county court was without jurisdiction to construe the release (R. 14, 15, 36).[3]

The instant proceeding was then instituted by the United States, seeking a declaratory judgment in the federal district court as to the interpretation of the release. The other claimants intervened and adopted the petition of the United States (R. 47). The district court entered judgment declaring that petitioner by the release had relinquished all her rights in the estate of the deceased (R. 39–42). On appeal by the petitioner, the Circuit Court of Appeals affirmed the judgment (R. 109).

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[3] Since the institution of the instant case, the District Court of Tulsa County has rendered a judgment, holding it had no jurisdiction to construe the release but determining that petitioner herein was not of Indian blood and therefore was not an heir. On appeal, the Supreme Court of Oklahoma affirmed this judgment. *Mashunkashey* v. *Mashenkashey*, decided September 29, 1942, not yet reported.

ARGUMENT

1. Petitioner's principal contention is that the property involved in this controversy is not restricted property and that therefore the United States has no right to maintain this action on behalf of its Indian wards.

The court below ruled correctly in rejecting that argument. Decedent's property was restricted (R. 48). The claimants on whose behalf the United States sues, are full blood restricted Osage Indians (R. 48). Petitioner in the County Court of Tulsa County, Oklahoma, had asserted rights in the estate which were adverse to the interests of those Indians. The validity of her claim depended upon the interpretation of the release which the state courts held they had no jurisdiction to construe. That the United States, by reason of its relationship to restricted Indians, has the power to institute actions to preserve their rights has been repeatedly decided by this Court.[4] *Heckman* v. *United States,* 224 U. S. 413; *United States* v. *Minnesota,* 270 U. S. 181, 194; *Cramer* v. *United States,* 261 U. S. 219. Having this power, the United States properly invoked the jurisdiction of the federal district court to determine the

[4] The position of petitioner that such suits cannot be instituted unless restricted property is involved is unsound. The courts have taken jurisdiction of many such suits. E. g. *McCurdy* v. *United States,* 246 U. S. 263; *Morrow* v. *United States,* 243 Fed. 854 (C. C. A. 8); cf. *United States* v. *Pumphrey,* 11 App. D. C. 44 (1897).

validity and effect of the release, regardless of what rights devolved upon petitioner. *Strickland* v. *Peters,* 120 F. 2d 53 (C. C. A. 5); cf. *Caesar* v. *Burgess,* 103 F. 2d 503, 506 (C. C. A. 10).

Moreover, it is clear that title to the property did not automatically devolve upon petitioner thereby removing the restrictions upon it. Section 7 of the Act of February 27, 1925, 43 Stat. 1008, provides that "none but heirs of Indian blood shall inherit from those who are one-half or more Indian blood of the Osage Tribe of Indians any right, title, or interest to any restricted lands, moneys, or mineral interests of the Osage Tribe".[5] This statute covers individual estates. *In re Martin's Estate,* 183 Okla. 177, 182; cf. *Taylor* v. *Tayrien,* 51 F. (2d) 884, 889 (C. C. A. 10), certiorari denied, 284 U. S. 672; *Washington* v. *Miller,* 235 U. S. 422, 427; see also *In re Thompson's Estate,* 179 Okla. 240, 243, certiorari denied, 302 U. S. 718; *In re Smith's Estate,* 188 Okla. 158, 162. And it has been adjudicated in the probate proceedings of this very estate that petitioner is not of Indian blood (see p. 6, n. 3, supra). Consequently, it would seem plain that she took no interest in the estate.[5]

[5] Although Congress had previously prescribed a different rule for the devolution of the property of Osage Indians, there can be no question of its power to make changes in respect of any estates not passed to the heir before enactment of the law. *United States* v. *Osage County,* 251 U. S. 128, 132; *In re Smith's Estate,* 188 Okla. 158, 161; *Jefferson* v. *Fink,* 247 U. S. 288, 294; cf. *Taylor* v. *Tayrien,* 51 F. (2d) 884, 889 (C. C. A. 10), certiorari denied, 284 U. S. 672.

But it is unnecessary to rest upon Section 7 or to pass upon its meaning or validity. Even if Section 7 did not apply, or if it were invalid, as petitioner contends, nevertheless petitioner acquired no title to the estate. Section 7 aside, the property of a deceased Osage passes according to the laws of Oklahoma [6] and by Oklahoma law an heir is dependent for his title upon probate proceedings adjudicating him to be the owner. *White House Lumber Co.* v. *Howard,* 142 Okla. 163, 165. When the release was executed, petitioner had not been adjudicated an heir. Consequently, she was in no better position than any other claimant to the estate and, of course, could contract to release her claim to it. *Scott* v. *Beams,* 122 F. 2d 777, 786 (C. C. A. 10), certiorari denied, 315 U. S. 809;

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[6] Section 6 of the Act of June 28, 1906, 34 Stat. 539, provides:

> That the lands, moneys, and mineral interests, herein provided for, of any deceased member of the Osage tribe shall descend to his or her legal heirs, according to the laws of the Territory of Oklahoma, or of the State in which said reservation may be hereinafter incorporated, except where the decedent leaves no issue, nor husband nor wife, in which case said lands, moneys, and mineral interests must go to the mother and father equally.

And Section 3 of the Act of April 18, 1912, 37 Stat. 86, gave the county courts of Oklahoma jurisdiction as probate courts over estates of deceased Osage Indians. As an incident to that jurisdiction the county court may determine heirs. *In re Thompson's Estate*, 179 Okla. 240, 242 (1937), certiorari denied, 302 U. S. 718.

Vinson v. *Cook,* 76 Okla. 46 (1919). See note 6 A. L. R. 555 (1919); 38 A. L. R. 759 (1920); 54 A. L. R. 976 (1927).

2. There is nothing requiring review by this Court of petitioner's contentions (Pet. 22–23) that her attorney, Hook, was not empowered to execute a release of her interest as an heir of the estate, and that the "release" signed on her behalf by Hook was insufficient to effect a complete settlement of all of petitioner's right, title, and interest in and to the estate of the deceased. On both points the decision below is plainly correct for reasons stated in the opinion.

CONCLUSION

The decision of the circuit court of appeals is right. It raises no question of general importance or conflict of decisions. The petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY, 1943.

U. S. GOVERNMENT PRINTING OFFICE: 1943

Supreme Court, U. S.
FILED
FEB 13 1943
CHARLES ELMORE CROPLEY
CLERK

No. 649

In the Supreme Court of the United States

October Term, 1942.

MARGARET MASHUNKASHEY, NOW BRADSHAW,
Petitioner,

vs.

UNITED STATES OF AMERICA, A. G. WILLIAMS, GDN. JAMES G. BLAINE, JR.; MAMIE MASHUNKASHEY, EXECUTRIX OF THE ESTATE OF BEN MASHUNKASHEY, DECEASED; AND L. M. COLVILLE AND JOHN W. KEITH, JOINT ADMINISTRATORS ESTATE OF PAH-PU-SON-TSA, *Respondents.*

On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Tenth Circuit.

Reply to Brief of Respondents in Opposition to Petition for Writ of Certiorari.

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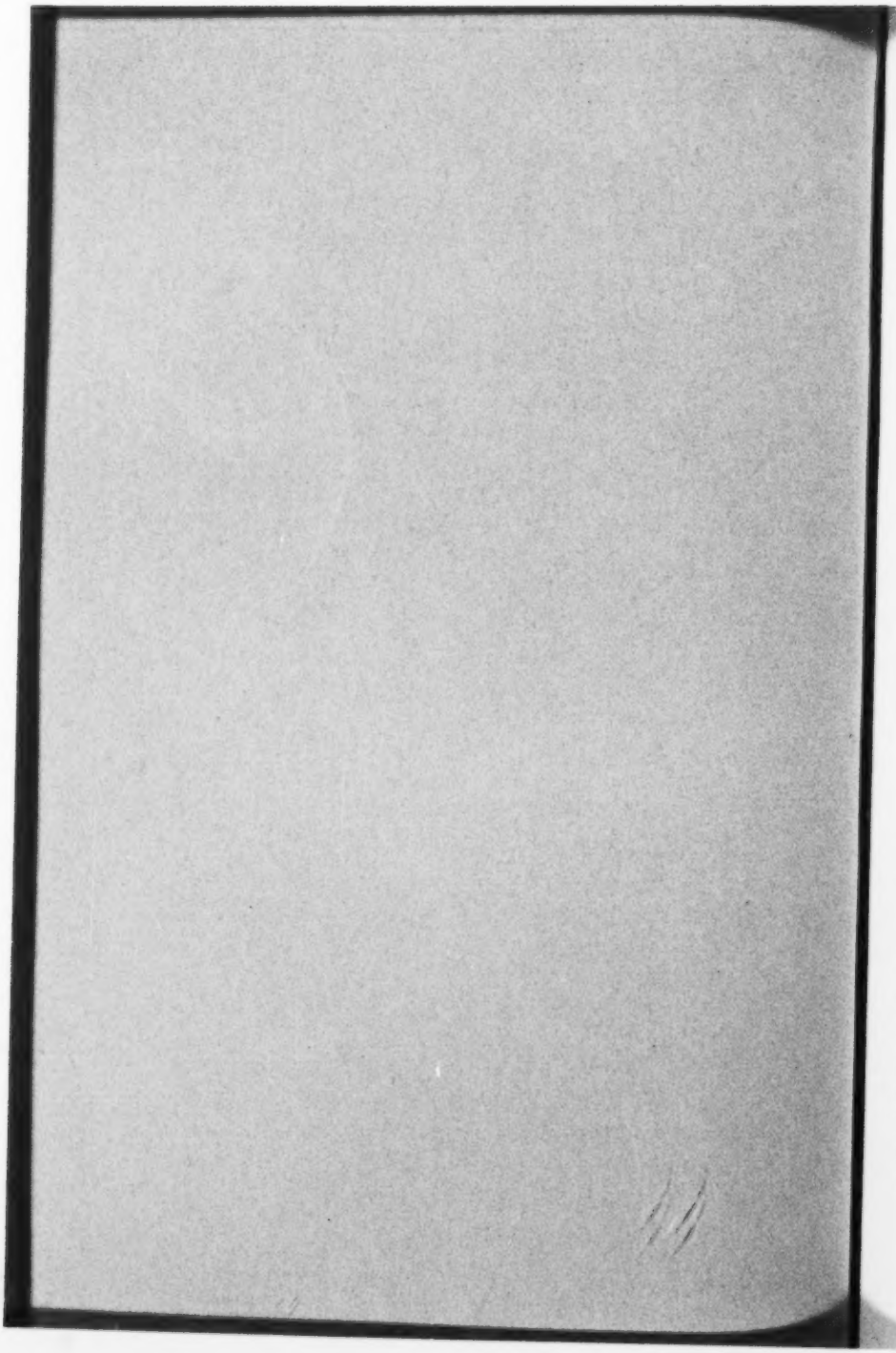

TABLE OF CASES.

	PAGE
Ansell v. City of Boston, (Mass.) 153 N. E. 167	8
Caesar v. Burgess, (C. C. A. 10) 103 F. (2d) 503, 506	7
City of Gainesville v. Brown-Crummer Inv. Co., 277 U. S. 54, 48 S. Ct. 454, 456	2
City of Indianapolis v. Chase National Bank of City of New York, 314 U. S. 63, 62 S. Ct. 15	2
Cramer v. United States, 261 U. S. 219, 43 S. Ct. 342	6
Davis v. Morgan, 186 Okl. 30, 95 P. (2d) 856	8-9
Dick v. Foraker, 155 U. S. 404, 15 S. Ct. 124	11
Dickson v. Luck Land Co., 242 U. S. 371, 61 L. ed. 371, 37 S. Ct. 167	4
Frost v. Spitley, 121 U. S. 533, 7 S. Ct. 1129	11
Grand Trunk Ry. Co. v. United States, (C. C. A. 7) 229 Fed. 116	8
Heckman v. United States, 244 U. S. 413, 56 L. ed. 820, 32 S. Ct. 424	3
Homer v. Lester, 95 Okl. 284, 219 Pac. 392, cert. den. 44 S. Ct. 330, 264 Pac. 580	10
Interstate Commerce Co. v. Baird, 194 U. S. 25, 36, 37, 24 S. Ct. 563	8
McCurdy v. United States, 246 U. S. 263, 38 S. Ct. 289	6
Moorehouse v. Noble, (Ind.) 141 N. E. 254	8
Moreland v. Director General of Railroads, (N. J.) 114 Atl. 424	8
Morrow, County Auditor, v. United States, (C. C. A. 8) 243 Fed. 856	6
Mullen, et al., v. United States, 224 U. S. 448, 32 S. Ct. 495, 496, 498	4
Osage Township Act of March 3, 1905, 33 Stat. 1061	6
Parr v. Reyman, (Cal.) 12 P. (2d) 441	10
Rust v. Gillespie, 90 Okl. 59, 216 Pac. 48	10
Ryan v. Carter, 93 U. S. 78, 83	8
Schlemmer v. Buffalo, R. & P. Ry. Co., 205 U. S. 1, 27 S. Ct. 407	8

TABLE OF CASES—Continued.

	PAGE
Smith v. Reneau, 188 Okl. 629, 112 P. (2d) 160	11
Straun v. Brady, 84 Okl. 66, 202 Pac. 505	10
Strickland v. Peters, (C. C. A. 5) 120 F. (2d) 53	7
United States v. Bond, (C. C. A. 10) 108 F. (2d) 504	9
United States v. King & Howe, (C. C. A. 2) 78 F. (2d) 693	8
United States v. Minnesota, 270 U. S. 171, 46 S. Ct. 298	5
United States v. Waller, 243 U. S. 452, 37 S. Ct. 430, 431, 433	3
United States v. West Virginia, 295 U. S. 463, 471, 475, 55 S. Ct. 789, 792, 793	11
White House Lbr. Co. v. Howard, 142 Okl. 163, 165, 286 Pac. 327	8

STATUTES.

Act of February 27, 1925, Sec. 7, 43 Stat. 1008	8
Act of April 12, 1926, 44 Stat. 239-240	7

IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1942.

No. 649

MARGARET MASHUNKASHEY, NOW BRADSHAW,
Petitioner,

vs.

UNITED STATES OF AMERICA, A. G. WILLIAMS, GDN. JAMES G. BLAINE, JR.; MAMIE MASHUNKASHEY, EXECUTRIX OF THE ESTATE OF BEN MASHUNKASHEY, DECEASED: AND L. M. COLVILLE AND JOHN W. KEITH, JOINT ADMINISTRATORS ESTATE OF PAH-PU-SCN-TSA, *Respondents.*

On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Tenth Circuit.

REPLY TO BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF *CERTIORARI.*

The respondent, the United States, and intervener respondents have filed separate briefs in opposition to this court granting the writ. The purpose of this reply will be to direct the court's attention to certain propositions stated in said brief which it is believed are not supported by authorities.

1. Intervener respondents on page 3 refer to Section 5 of Rule 38 of this court to the effect that the writ will only be granted where there is a special or important reason, asserting, however, on page 3 as follows: "There is but one question which relates itself to the propriety of the granting *certiorari.* * * * That question is, whether the United States District Court for the Northern District of Oklahoma has jurisdiction to render a declaratory judgment under the facts and circumstances related in the above statement."

The question of jurisdiction is and always has been a question of importance and so considered by this court. In *City of Gainesville* v. *Brown-Crummer Inv. Co.,* 277 U. S. 54, 48 S. Ct. 454, 456, this court stated:

> "* * * Of course a question of jurisdiction cannot be waived. Jurisdiction should affirmatively appear, and the question may be raised at any time. *Grace* v. *American Central Ins. Co.,* 109 U. S. 278, 283, 3 S. Ct. 207, 27 L. ed. 932; *Mansfield C. & L. M. Railway Co.* v. *Swan,* 111 U. S. 379, 382, 4 S. Ct. 510, 28 L. ed. 462; *Mattingly* v. *Northwestern Virginia Railroad Co.,* 158 U. S. 53, 56, 57, 15 S. Ct. 725, 39 L. ed. 894."

(See also *City of Indianapolis* v. *Chase National Bank of City of New York,* 314 U. S. 63, 62 S. Ct. 15.)

The position of petitioner may be summarized as follows: *That the United States has no authority to maintain an action upon behalf of Indian wards and confer jurisdiction on the federal court of controversies relating to unrestricted property, unless to enforce some duty or obligation created by treaty or statute.*

In addition to authorities cited in our original brief, pages 13 to 18, as to the right of the United States to main-

tain an action on behalf of Indians to decree a defendant has no interest in property without establishing the interest claimed is restricted or acquired in violation of government restrictions. The court's attention is directed to *United States* v. *Waller,* 243 U. S. 452, 37 S. Ct. 430, 431, 433, wherein the United States brought action in the federal court on behalf of Indian wards to cancel deeds executed by the wards. The bill alleged the property had been acquired from the Indians by fraud and based solely upon the theory of its guardianship over said Indians, sought to vacate and cancel the deeds. The district federal court dismissed the bill on the theory the United States had no capacity to maintain the action and confer jurisdiction upon the federal court as the land was unrestricted. The Circuit Court of Appeals for the Eighth Circuit certified to this court the following question:

> Has the United States capacity to maintain the suit in question on behalf of the Indians named?

The court, in answering said question, determined the lands were not restricted, and further stated:

> "In view of the legislation and the particular act in question, we are unable to find any authority in the United States to maintain this suit on behalf of the Indians named."

The court distinguished the case of *Heckman* v. *United States,* 244 U. S. 413, 56 L. ed. 820, 32 S. Ct. 424, wherein it was held the United States could maintain an action to cancel conveyances "made by members of the Cherokee Nation in violation of restrictions imposed by Acts of Congress," and stated:

> "That case differs from the present one in which there has been no disposition of the lands in violation

of restrictions imposed by Congress upon alienation by the Indians."

The court further stated:

> "It does not follow that the Indians are without remedy in proper actions brought by themselves or their guardians, if there be such, for the protection of their rights."

The opinion quotes from *Dickson* v. *Luck Land Co.*, 242 U. S. 371, 61 L. ed. 371, 37 S. Ct. 167, as follows:

> "With those restrictions entirely removed and a fee simple patent issued, it would seem that the situation is one in which all questions pertaining to the disposal of the land naturally would fall within the scope and operation of the law of the state."

And concludes:

> "We reach the conclusion that in this suit, the United States was without capacity to bring the action for the benefit of the Indians named."

In *Mullen, et al.,* v. *United States,* 224 U. S. 448, 32 S. Ct. 495, 496, 498, the government brought suit to cancel certain conveyances made by full-blood heirs of allottee. That as to the authority of the United States to maintain the action for Indian wards, the court stated:

> "The government is entitled to invoke the equity jurisdiction of its courts for the purpose of enforcing these restrictions.
>
> * * * * * * * *
>
> "The question remains whether, in the execution of the conveyances to the appellants, the restrictions imposed by Congress have been violated."

The court reviewed the various Acts of Congress as to restrictions and held that the restrictions, upon death of

the allottee, ceased, and the land as it passed to the heirs was no longer restricted and the Indians were entitled to execute the conveyances.

The court then stated:

> "* * * These Indian heirs were vested with an interest in the property which, in the absence of any provision to the contrary, was the subject of sale. The fact that they were 'full-blood' Indians makes no difference in this case, for, at the time of the conveyance in question, heirs of the full-blood, taking under the provisions of paragraph 22 of the supplemental agreement had the same right of alienation as other heirs."

The above cases are conclusive that the government has no capacity by virtue of its general guardianship to maintain an action upon behalf of Indian wards, unless the subject-matter of the action involves restricted property, or, unless the duty of the government is based and founded upon some treaty or federal statute.

The government in its brief asserts to the contrary. However, the decisions cited and relied upon do not support a contrary view.

As pointed out in *United States* v. *Waller, supra,* the capacity of the government to maintain the action in *Heckman* v. *United States, supra,* was based upon the fact the land was disposed of in violation of restrictions imposed by Congress. In *United States* v. *Minnesota,* 270 U. S. 171, 46 S. Ct. 298, the court held that where the United States is only a nominal party it cannot maintain an action and confer jurisdiction upon the court. However there was involved in said case the duty and obligation owed by the United States to the Indians under treaty to account to the Indians for the proceeds from the land on which patents

had wrongfully issued in violation of that duty and obligation. In *Cramer* v. *United States,* 261 U. S. 219, 43 S. Ct. 342, wherein the government had, contrary to statute, issued a grant to land which already had been, under statutory construction, reserved and otherwise disposed of to the Indians. The court held the government was under the direct duty and obligation to protect the Indians in their possession.

McCurdy v. *United States,* 246 U. S. 263, 38 S. Ct. 289, holds contrary to the government's contention in the present case. The government brought suit to cancel taxes levied upon lots owned by an Indian in the City of Pawhuska. The lots at one time were a part of Osage Nation. Said tribal title was extinguished under the Osage Township Act of March 3, 1905 (33 Stat. 1061). Thereafter one of said lots passed in possession of an Osage Indian and, in acquiring the property, the deed of the Indian contained a restriction against alienation without consent of the Secretary, but was not tax exempt. The court held that restriction against alienation was not violated by levying a tax upon the same. The District Court held it had jurisdiction and the United States had the right to maintain the action, but this court reversed the judgment of the lower court with directions to dismiss the bill.

In *Morrow, County Auditor,* v. *United States,* (8 C. C. A.) 243 Fed. 856, the question involved was whether, under the patents issued by the government, the land was taxable. The court held the land was free from taxation and having issued the patent to the Indians, it was the duty of the government to protect the Indians against taxes levied in violation of terms of patent which the government issued.

The above cases do not support the government's the-

ory that the United States has capacity to maintain an action and confer jurisdiction upon the federal court of a controversy between Indians and third parties, unless the controversy relates to restricted land.

The case of *Strickland* v. *Peters,* (5 C. C. A.) 120 F. (2d) 53, has no application, as jurisdiction was conferred by reason of diversity of citizenship.

The case of *Caesar* v. *Burgess,* (10 C. C. A.) 103 F. (2d) 503, 506, has no application, as jurisdiction in said case was conferred by special Act of Congress, being Section 3 of the Act of April 12, 1926, (44 Stat. 239-240) which authorized the United States on behalf of restricted members to remove a case to the federal court. The court in that case recognized it would have no jurisdiction under general law.

It is submitted, under the authority of *United States* v. *Waller, supra,* and *Mullen* v. *United States, supra,* and authorities cited at pages 13 to 17 of our original brief, the District Court was without jurisdiction of the controversy herein involved, as the controversy involved private rights not based or founded upon any federal statute, but governed by local law.

The government and interveners seek to change their position in this court and uphold jurisdiction of the federal court and the judgment on the merits on a theory different from that set forth in the pleadings (R. 9-17), and on which the case was tried in the lower court; that is, that the petitioner herein is disqualified by reason of not being of Indian blood from inheriting any portion of said estate. In the lower court, the respondents took the position that the question of Indian blood was not involved and objected to the evidence on behalf of petitioner that she was of Indian

blood (R. 98). The petitioner, over objections of respondents, testified that her father was dead; that he had told her he was of Cherokee blood, deriving said blood either from his grandmother or great-grandmother.

They now assert that under Section 7 of the Act of Congress of February 27, 1925, (43 Stat. 1008) to-wit:

> "Hereafter none but heirs of Indian blood shall inherit from those who are one-half or more Indian blood of the Osage tribe of Indians any right, title, or interest to any restricted lands, moneys or mineral interests of the Osage tribe; *provided*, that this section shall not apply to spouses under existing marriages,"

she is disqualified as an heir. If said statute has any application, it constitutes an exception to the general statutes regulating descent, and the burden was upon the respondents to plead the application of the statute, and further prove by evidence that petitioner was not of Indian blood. This they did not do. (*Schlemmer* v. *Buffalo, R. & P. Ry. Co.*, 205 U. S. 1, 27 S. Ct. 407; *Grand Trunk Ry. Co.* v. *United States*, (7 C. C. A.) 229 Fed. 116; *Interstate Commerce Co.* v. *Baird*, 194 U. S. 25, 36, 37, 24 S. Ct. 563; *Ryan* v. *Carter*, 93 U. S. 78, 83; *Ansell* v. *City of Boston*, (Mass.) 153 N. E. 167; *Moreland* v. *Director General of Railroads*, (N. J.) 114 Atl. 424; *United States* v. *King & Howe*, (2 C. C. A.) 78 F. (2d) 693; *Moorehouse* v. *Noble*, (Ind.) 141 N. E. 254.)

Clearly, the judgment cannot be upheld upon a theory unsupported by pleadings or evidence.

Respondents cite *White House Lbr. Co.* v. *Howard*, 142 Okl. 163, 165, 286 Pac. 327, in support of the contention that no title vested in petitioner, the surviving wife of decedent. On page 17 of our brief, we cited *Davis* v. *Morgan*, 186 Okl.

30, 95 P. (2d) 856, which held that on death of intestate, vesting of title to intestate's property in the heirs was immediate. Said decision construed Section 1615, Oklahoma Statutes 1931, which reads as follows:

> "The property, both real and personal, of one who dies without disposing of it by will, passes to the heirs of the intestate, subject to the control of the County Court, and to the possession of any administrator appointed by that court for the purpose of administration."

The County Court in the administration of the estate may, under said section, dispose of said property under certain conditions and thus divest the heir of said property by operation of law. In *White House Lbr. Co.* v. *Howard, supra,* the County Court in the administration of the estate, sold the property to pay debts. The lumber company had a judgment against one of the heirs which constituted a lien upon the heir's interest in the real estate, and contended this lien was not disturbed by the sale of the property by the County Court. The court held to the contrary as the title of the heir was subject to the power of the County Court in the administration proceedings to sell the property, and this wiped out the heir's title, and also the lien asserted against said heir's interest. The same is true if the land is sold in partition. (See *United States* v. *Bond,* (10 C. C. A.) 108 F. (2d) 504.)

The above case has no application to any issue involved herein.

Respondents assert their right under a written instrument not executed by petitioner, but by an attorney without sufficient statutory authority. The applicable statutes as to power to convey interest in real property are copied

in appendix of our original brief, page 31. The government relied upon a letter (R. 50) which is insufficient under said statute. No fraud or estoppel is pleaded or established.

Interveners on page 5, in support of the right of the government and interveners to maintain this action in the federal court, state: "* * * particularly in view of the fact that the state courts were refusing to assume jurisdiction to pass upon the question of the validity of the release." The record does not support that statement. The County Court held it had no jurisdiction in administration proceedings to determine controversy herein, as in said proceeding, said court had no equity jurisdiction to determine controversies arising subsequent to ancestor's death. Such is the holding in *Parr* v. *Reyman,* (Cal.) 12 P. (2d) 441, wherein it is held:

> "'Matters of probate' within the probate court's jurisdiction do not include claims against heirs of devisee for his portion of the estate, arising subsequent to ancestor's death, whether claim arises by virtue of contract or *in invitum.*"

In *Rust* v. *Gillespie,* 90 Okl. 59, 216 Pac. 48, as to equity powers in matters of probate, the court held:

> "Not having general equity powers, courts of probate have no jurisdiction over the subject of trusts, or regulation and control of trust estates, these questions belong exclusively to courts of equity." (Citing *Straun* v. *Brady,* 84 Okl. 66, 202 Pac. 505, and *Homer* v. *Lester,* 95 Okl. 284, 219 Pac. 392, *certiorari* denied, 44 S. Ct. 330, 264 Pac. 580.)

The above is the extent of the holding of the County Court, and it was so alleged in the petition. (R. 14)

Respondents on page 8 of their brief assume, contrary

to settled law, that in an action to quiet title, the burden is on defendant to establish title. The correct rule is stated in our original brief, page 21, that the burden is upon plaintiff to allege and establish superior title. (*United States* v. *West Virginia*, 295 U. S. 463, 471, 475, 55 S. Ct. 789, 792, 793; *Dick* v. *Foraker*, 155 U. S. 404, 15 S. Ct. 124; *Frost* v. *Spitley*, 121 U. S. 533, 7 S. Ct. 1129; *Smith* v. *Reneau*, 188 Okl. 629, 112 P. (2d) 160.)

The opinion of the Supreme Court of Oklahoma in construing Section 7 of the Act of February 27, 1925, *supra*, is not final and will be presented to this court in a few days.

The question of the capacity of the United States to maintain the action and confer jurisdiction upon the federal court to construe the force and effect of an instrument executed by attorney for petitioner involves no federal question and the jurisdiction of the court is duly challenged in the application for the writ. This might not be important if this court or other Circuit Courts had held the federal courts had jurisdiction of such controversies. But when the decisions of this court support a contrary view, the question becomes important.

It is submitted when the Circuit Court of Appeals, as it has by this decision, extends the jurisdiction of the court to a controversy between citizens of the same state which involves no federal statute or question, or disposition of restricted property in violation of federal restrictions, contrary to the spirit and letter of the former decisions of this court, the writ should issue.

Respectfully submitted,

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